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State of New York Public Employment Relations Board Decisions from June 14, 2017

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State of New York Public Employment Relations Board Decisions from June 14, 2017

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-6417

**COUNTY OF OTSEGO AND OTSEGO COUNTY
SHERIFF,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

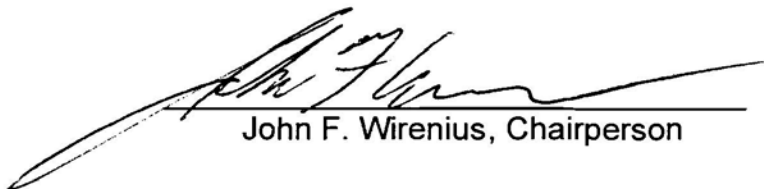
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Account Clerk Typist-Sheriff, Correction Officer, Correction Sergeant, Correction Lieutenant, and Senior Civil Service Clerk.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6439

TOWN OF WOODSTOCK,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

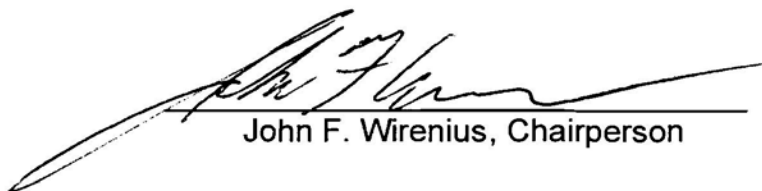
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Laborers, HMEOs, MEOs, and Mechanics in the Highway Department

Excluded: All other Town employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**AMITYVILLE SECURITY ASSOCIATION,
NYSUT, AFT, NEA, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-6450

AMITYVILLE UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

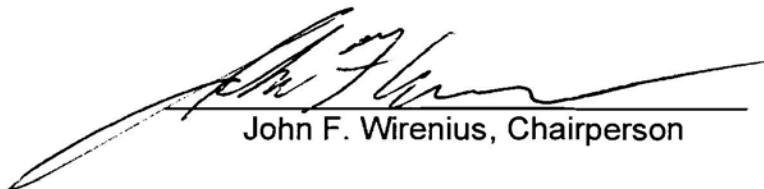
IT IS HEREBY CERTIFIED that the Amityville Security Association, NYSUT, AFT, NEA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time Security Guards.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Amityville Security Association, NYSUT, AFT, NEA, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**ASSOCIATION OF JAMESTOWN
PARAPROFESSIONALS,**

Petitioner,

CASE NO. CP-1464

-and-

JAMESTOWN PUBLIC SCHOOL DISTRICT,

Employer,

-and-

JAMESTOWN TEACHERS' ASSOCIATION,

Intervenor.

JEFFREY G. KEPPEL, for Petitioner

**HODGSON RUSS, LLP (ELIZABETH D. MCPHAIL of counsel), for
Employer**

JOHN M. LICHTENTHAL, for Intervenor

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Association of Jamestown Paraprofessionals (AJP), the Jamestown Public School District (District), and the Jamestown Teachers' Association (JTA) to a decision of an Administrative Law Judge (ALJ) granting the unit placement petition filed by JTA and placing the position of

Teacher 2 in JTA's bargaining unit.¹

EXCEPTIONS

The exceptions filed by AJP and JTA argue that inclusion of the title "Teacher 2" in the bargaining unit represented by JTA violates New York State Education Law and/or Civil Service Law, that the ALJ's decision creates a title that was not petitioned for, and that the ALJ's decision frustrates the parties' negotiation efforts since it would impose unlawful parameters on the parties. AJP and JTA argue that the ALJ's decision should be modified such that all references to "Teacher 2" be stricken and replaced with "employees and/or positions petitioned for by Petitioner" or that the ALJ's decision should be set aside and the case remanded for further proceedings. The District argues that the ALJ erred by failing to conduct a hearing and that the ALJ's decision should be set aside and the case remanded.

For the reasons that follow, we remand this case to the ALJ for further proceedings.

FACTS

On October 22, 2015, AJP filed a unit placement petition, stating that the District had hired four "tutors to work at the Tech Academy" and that these employees should be placed in the unit represented by AJP because the "tutors are doing the same work that teacher aides (paraprofessionals) perform throughout the rest of the District." The District answered, asserting, among other things, that the petitioned-for employees did not share a community of interest with teacher aides represented by AJP.

On March 9, 2016, JTA filed a motion to intervene for the purpose of placing the

¹ 49 PERB ¶ 4004 (2016).

at-issue employees and positions within the bargaining unit represented by JTA.

A hearing was scheduled for April 7 and 8, 2016. A pre-hearing conference was held on April 7, 2016, but no hearing was conducted.

The ALJ issued a letter dated April 8, 2016. The letter granted the motion to intervene filed by JTA and memorialized the discussions that took place at the pre-hearing conference. The ALJ's letter stated that "this matter has been resolved pursuant to the following understandings:"

1. The District has agreed to consent to the placement of the titles at issue in the negotiating unit represented by the JTA after changing the name of the title from Tutor to Teacher 2. There are currently six employees holding said title;
2. The Association of Jamestown Paraprofessionals (AJP) has no objection to the placement of the title of Teacher 2 in the negotiating unit represented by the JTA; and
3. The JTA accepts the placement of the title of Teacher 2 in the negotiating unit of District employees it represents.

The ALJ's letter further stated:

If any of the parties take exception to all or part of the understandings referenced above, they are advised to inform me of those objections in writing, **postmarked on [or] before Friday, April 15, 2016**, with a copy to the other representatives. If I fail to here [sic] from the parties as outlined above, I will issue a consent decision forthwith. [Emphasis in original.]

No party contacted the ALJ with any objections to his letter.

On June 7, 2016, the ALJ issued a decision finding that employees in the title of "Teacher 2" share a community of interest with the titles currently in the negotiating unit represented by JTA and that the placement satisfies the criteria set forth in § 207 of the Public Employees' Fair Employment Act (Act).

Each of the parties then filed the instant exceptions to the ALJ's decision. Each

party submitted an affidavit from their representative in support of their exceptions. The affidavits were consistent with each other and contained, among other things, information about the pre-hearing conference and subsequent events.

According to the affidavits, the pre-hearing conference on April 7, 2016 was characterized as settlement negotiations between the representatives of the three parties. At the conclusion of the discussions, the parties had reached an understanding that the at-issue employees would be placed in the bargaining unit represented by JTA. The parties had discussed the creation of the job title "Teacher 2" to describe the petitioned-for employees. A written settlement was not produced and settlement discussions were not fully concluded. The parties informed the ALJ that an understanding had been reached, that settlement discussions would continue, and that the parties were looking to include the at-issue employees in the bargaining unit represented by JTA under the new job title, "Teacher 2."

On or about April 14, 2016, the parties drafted a Memorandum of Agreement ("MOA") that reflected the understandings reached at the pre-hearing conference and would resolve the unit clarification petition. The draft MOA was immediately sent to the Legal Department of the New York State United Teachers (NYSUT) for review, where it was determined that the inclusion of the title "Teacher 2" would violate New York State Education Law and/or Civil Service Law because, as agreed by the parties, the title of "Teacher 2" did not provide certain required legal protections for employees in said title.

On or about April 15, 2016, the representative for JTA informed the District's representative of the problem and, on or about April 18, 2016, the JTA and the District agreed that the inclusion of the title "Teacher 2" in the unit represented by the JTA was

not an adequate resolution of the matter. According to the affidavits, the parties continue to negotiate the issue.

DISCUSSION

We find it appropriate to reverse the ALJ's decision and to remand this matter to the ALJ for further proceedings, including a hearing if necessary. In doing so, we note that we do not fault the ALJ for his handling of this case. From the assertions made by the parties on exceptions, it appears that the ALJ's April 8, 2016 letter accurately reflected the understanding of the parties at that time. No party contested the ALJ's summary of the parties' understanding, despite being given the opportunity to do so and despite being informed that the ALJ would issue a consent decision in the absence of objections.

Nevertheless, shortly after the ALJ issued his letter, the parties' agreement to included petitioned-for employees in JTA's bargaining unit under the title of "Teacher 2" was nullified by the opinion of NYSUT's Legal Department that the title of "Teacher 2" could not be used without raising potential conflicts with the Education Law and the Civil Service Law. Unfortunately, none of the parties contacted the ALJ to inform him that the title of "Teacher 2" would not be used and that settlement discussions remained ongoing. Still, all three parties agree that the ALJ's decision does not reflect a legally viable agreement, and that the parties remain in negotiations over the proper title to be used for the at-issue employees as well as the unit in which at-issue employees should be placed. Given that all parties to the prior agreement wish to be released therefrom, and given that there has not been any showing of detrimental reliance on the prior understanding, we shall grant the parties' request, reverse the ALJ's decision, and

remand for further proceedings.²

IT IS, THEREFORE, ORDERED that the ALJ's decision is reversed and remanded for further proceedings not inconsistent with this decision.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

² Compare *State of New York*, 47 PERB ¶ 3009 (2014), confirmed sub nom. *State of New York v New York State Pub Empl Relations Bd*, 137 AD3d 1467, 49 PERB ¶ 7004 (3d Dept 2016) (Board declined to set aside an unambiguous stipulation that settled a representation dispute over objection of one of the parties).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 456,**

Petitioner,

- and -

**CASE NOS. CP-1436
and CP-1444**

COUNTY OF WESTCHESTER,

Employer.

In the Matter of

COUNTY OF WESTCHESTER,

CASE NO. E-2594

Upon the Application for Designation of Persons
as Confidential.

EMILY A. ROSCIA, ESQ., for Petitioner

**ROBERT F. MEEHAN, COUNTY ATTORNEY (FREDERICK M. SULLIVAN of
counsel), for Employer**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the International Brotherhood of Teamsters, Local 456 (Local 456) and the County of Westchester (County) to a decision by an Administrative Law Judge (ALJ) on two unit placement petitions filed by Local 456 to have ten positions placed into its bargaining units and an application by the County to exclude employees as confidential within the meaning of § 201.7(a) of the Public Employees' Fair Employment Act (Act).¹ The County's application, made pursuant to § 210.10 of our Rules of Procedure (Rules), sought to exclude all of the positions

¹ 49 PERB ¶ 4003 (2016).

petitioned for by Local 456 and also to exclude as confidential employees all assistant county attorneys (ACAs) currently included in the unit.

After a hearing, the ALJ found that the following titles should be placed in the unit: Director of Operations (Senior Programs and Services), Director of Administrative Services (Management Operations), Director of Program Development II (Capital Projects), Director of Temporary Assistance, Director of Child Welfare, and Director of Program Development I (Capital Asset Management). The ALJ found that the following titles should be excluded from the unit as confidential employees: Director of Fiscal Operations, Associate Budget Director, Senior Budget Analyst, and Assistant Director of Division (PRC). Further, the ALJ found that ACAs were not confidential employees and thus were properly included in the unit.

EXCEPTIONS

Local 456 excepts to the ALJ's designation of the titles of Director of Fiscal Operations, Associate Budget Director, and Senior Budget Analyst as confidential employees. The County argues that there is not a sufficient community of interest to include any of the petitioned-for titles in the existing bargaining unit.² The County also argues that the ALJ should have excluded the titles of Director of Administrative Services (Management Operations) and the ACAs because they are confidential employees.

Based upon our review of the record and the parties' arguments, we affirm the

² Other than its general argument that none of the petitioned-for employees share a community of interest with employees in the bargaining unit, the County did not file any specific exceptions to the ALJ's finding that the following titles should be placed in the unit: Director of Operations (Senior Programs and Services), Director of Program Development II (Capital Projects), Director of Temporary Assistance, Director of Child Welfare, and Director of Program Development I (Capital Asset Management). There are also no exceptions to the ALJ's decision to exclude the Assistant Director of Division (PRC) as a confidential employee.

ALJ's decision, in part, and remand, in part.

FACTS

Community of Interest

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. The unit represented by Local 456 consists of more than 300 white collar administrative titles, including but not limited to, directors and associate directors.³ The civil service job descriptions for the titles in the bargaining unit indicate that they are competitive, noncompetitive or exempt. The civil service job descriptions for all ten of the positions for which Local 456 has petitioned state that those are competitive posts.⁴ The job descriptions for many of the unit titles require four years of college or equivalent training as the minimum qualifications.⁵ The same is true for the ten positions in Local 456's petitions. The partially stipulated record indicates that those same ten titles share the same salary structure as unit positions, identified as groups "X" through "XIX" and having five steps per group.⁶ They also share work locations, similar lines of supervision, and similar insurance benefits.⁷

Some of the unit positions perform supervisory functions. For example, the Finance Department Director of Fiscal Operations is on the same line on the organizational chart as the unit positions of Benefits Manager and Payroll Manager.⁸ In the Department of Health, the Director of Administrative Services reports to the Deputy Commissioner for

³ Joint Exhibit (JX) 2.

⁴ *Id.*, at pp. 74-100.

⁵ *Id.*

⁶ *Id.*, at pp. 48-50.

⁷ *Id.*, at pp. 34-36; pp. 15-33; p. 46, pp. 52-69, respectively.

⁸ JX 1, at p. 18 and JX 2, at p. 35, respectively.

Administration,⁹ as does the unit position of Assistant Commissioner for Planning and Evaluation.¹⁰ In the Department of Parks, Recreation and Conservation, the Director of Program Development II (Capital Projects) is in the same designated category as the unit position of Director of Park Facilities.¹¹

There is also a significant similarity of titles between those petitioned for and those already in the unit. The petitioned-for title of Director of Administrative Services (Management Operations) is similar to the unit positions of Director of Administrative Services (Corrections), Director of Administrative Services (DA), Director of Administrative Services (Env Fac), Director of Administrative Services (GS), Director of Administrative Services (L&R), Director of Administrative Services (PRC), Director of Administrative Services (Probation), and Director of Administrative Services (PW).¹² The same is true for the positions of Director of Child Welfare and Director of Temporary Assistance. The unit already includes more than 100 different Director titles, such as Director of Patient Care Services, Director of Pediatric Services (DSS), Director of Social Services (MRI), and Director of Social Services (WCMC).¹³ The same is true of the petitioned-for position of Director of Fiscal Operations, which is comparable to the unit positions of Director of Finance (RTI) and Director of Fiscal Affairs (Transport).¹⁴

Local 456 has petitioned to place in the unit the title Director of Operations (Senior Programs and Services). The unit already includes several Director of Operations titles.¹⁵

⁹ JX 1, at p. 19.

¹⁰ JX 2, at p. 30.

¹¹ JX 1, at p. 26 and JX 2, at p. 33, respectively.

¹² JX 1, at p. 9.

¹³ *Id.*, at pp. 9-11.

¹⁴ *Id.*, at p. 9.

¹⁵ *Id.*, at p. 10.

Local 456 has petitioned to place in the unit the title of Director of Program Development I (Capital Asset Management). The unit already includes several Director of Program Development titles.¹⁶ Local 456 has petitioned to place in the unit the title of Director of Program Development II (Capital Projects). The unit already includes several Director of Program Development II titles.¹⁷ Local 456 has petitioned to place in the unit the title of Assistant Director of Division (PRC). The unit already includes several Assistant Director titles.¹⁸ Local 456 has petitioned to place in the unit the title of Associate Budget Director. The unit already includes the title Associate Budget Director-Director of Risk Management.¹⁹ Local 456 has petitioned to place in the unit the title Senior Budget Analyst. The unit already includes the title Senior Management Analyst.²⁰

The evidence which was offered pertaining to specific disputed titles and individuals therein is separately presented below.

Director of Fiscal Operations (DFO)

Commissioner of Finance, Ann Marie Berg, supervises the title of DFO. Berg is a direct report to the County Executive and is in charge of all cash financial matters, including payroll, benefits, accounts payable, general ledger functions, treasury functions, debts, and purchases. Berg has the authority to create and implement financial policies regarding those areas under her control as well as policies relating to the reporting hierarchy and responsibilities. She has had a direct role in negotiations, both at the table for some units and, with respect to others, in discussions with County negotiators

¹⁶ *Id.*

¹⁷ *Id.*, at pp. 10-11.

¹⁸ *Id.*, at p. 7.

¹⁹ *Id.*, at p. 6.

²⁰ JX 1, at p. 13.

regarding financial issues and employee benefits. Berg has been involved in the creation of County proposals and their prioritization, as well as costing union proposals.

The two DFOs within the Department of Finance are Patricia Jones and Mario Arena.²¹ Berg testified that she created the DFO positions to have someone she and her deputies could work closely with on a confidential basis.²² Berg testified that Arena and Jones are interchangeable in terms of duties and skills, but Arena focuses more on high level financial calculations relating to County debt, capital projects and bonding proposals, while Jones focuses more on treasury functions and the general ledger. Both employees report directly to Berg and, at times, to the deputy commissioner Sergio Sensi. Even then, however, Berg testified that she is involved in the discussion.²³

Both Arena and Jones are involved in costing out potential County negotiation proposals relating to salary and benefits.²⁴ They have also costed out union proposals to assist the County in determining whether to accept or reject them.²⁵ Berg also testified that in the context of costing out bargaining proposals, Arena and Jones are aware of the County's negotiations goals and know which proposals are most important to the County as well as the County's strategies.²⁶

Senior Budget Analyst (SBA)

Lawrence Soule is the County's Budget Director. He was appointed by the County

²¹ There appears to be a third DFO, Joseph Matthews, in the Department of Health. The only testimony offered at the hearing regarding Matthews was that Berg testified that he is not in the department and she was not sure if he ever was. Tr, at p. 156. The ALJ did not designate Matthews as a confidential employee, and no exceptions were filed with respect to Matthews.

²² Tr, at p. 146.

²³ Tr, at p. 147-148.

²⁴ Tr, at pp. 150-151.

²⁵ Tr, at pp. 151-152, pp. 158-159.

²⁶ Tr, at pp. 155-156, pp. 161-163.

Executive and reports to the Deputy County Executive. He is the appointing authority for his department and is directly involved in collective bargaining. Soule helps to develop and cost proposals, costs out benefit concessions, costs tentative raises retroactively and prospectively, and makes recommendations for counterproposals on negotiations. The hierarchy under Soule is the Deputy Budget Director, then the ABDs and the SBAs, although that structure exists largely on paper and most lines report directly to him.

Within Soule's department are five SBAs: Gideon Grande, Patricia Haggerty, Carlo Maniscalco, Bill Olli and Ryan Moore. Each one is assigned responsibility for a certain number of departments within the County with respect to budget preparation. They review requests and assist Soule in preparing his budget recommendations to the County Executive.

Grande has a good deal of ad hoc responsibilities and is responsible for assisting the County in negotiations by costing out proposals.²⁷ Grande does the final calculations, but works in conjunction with the other SBAs and obtains information necessary for the costings from other SBAs, who get it from the departments they oversee.²⁸ Soule testified that Grande is involved in costing proposals before they are presented to the union in negotiations and that Grande might be directly involved in discussions early in the negotiations process with the Deputy County Executive and the County's chief negotiator.²⁹

Soule also testified that almost everyone in his department has access to information that the County would not want to make public, that the other SBAs routinely

²⁷ Tr, at p. 177.

²⁸ Tr, at pp. 177-178, p. 183, p. 194.

²⁹ Tr, at p. 180, p.182.

assist Grande, and that Grande would tell the SBAs why he needed the information he was seeking.³⁰ Soule said that the workings of the department are such that confidential information is shared with everyone in the department and he speaks openly to the SBAs about negotiations.³¹ In most cases, for example, when employees within the budget office are asked to cost out County proposals, they are informed of the County's bargaining goals within specific units or for particular unions and that is before those proposals are communicated across the table.³²

Associate Budget Director (ABD)

There are currently two ABDs who report to Soule, Mark Medwid and Lorraine Yazzetta. Medwid focuses on the operating side of the budget and coordinates and oversees the SBAs in their budget preparation, while Yazzetta manages the capital side and the County's five-year capital plan.

Soule testified that both ABDs are privy to and review costing of potential proposals that impact the departments they oversee.³³ For example, since Yazzetta manages the Department of Public Safety, she would be privy to negotiation proposals and the costing out sheets for proposals related to those departments.³⁴ The costing would then go to Grande to be checked for accuracy. Soule also testified that Medwid has accompanied him to meetings with the Deputy County Executive and the County Executive and that both he and Yazzetta have appeared before the County Board of Legislators. Soule testified that he would discuss with Medwid issues regarding negotiations that he would not bring

³⁰ Tr, at p. 182, p. 184.

³¹ Tr, at p. 184, pp. 195-197.

³² Tr, at p. 186.

³³ Tr, at pp. 185-186.

³⁴ *Id.*

up in a general departmental meeting with staff.³⁵ Soule also testified that his answers regarding Yazzetta would be the same, and he recalled specific conversations with her regarding the PBA negotiations and the County's assumptions in the budget for potential increases in the upcoming CBA.³⁶

Director of Administrative Services (Management Operations) (DAS-MO)

Six persons hold this title: William Fallon, Robert Kopenhaver, Joy Mathai, Maria Palumbo, Thomas Poovapallil and Donna Straface. Kopenhaver holds the title in the Department of Public Works and Transportation.³⁷ Palumbo holds the title in the Health Department.³⁸ Poovapallil holds the title in the Department of Community Mental Health, and Straface holds the title in the IT Department.³⁹ There is no indication in the record of which departments Fallon and Mathai are located in.

The parties introduced the job description and organizational charts related to the DAS-MO position.⁴⁰ The job description states that the position directs the personnel function for the department to which it is assigned, "including the implementation of laws, policies, procedures and labor agreements; processing all payroll/personnel forms and documents; maintaining accurate time and attendance records; resolving labor conflicts; implementing performance standards and disciplinary procedures; and maintaining detailed, accurate personnel records and files."

The organizational charts indicate that in the Department of Community Mental Health, the DAS-MO (Poovapallil) reports to the Commissioner and shares a line with the

³⁵ Tr, at p. 197.

³⁶ Tr, at p. 198.

³⁷ Tr, at p. 137.

³⁸ Tr, at p. 305.

³⁹ Tr, at p. 66, p. 67.

⁴⁰ JX 1, at pp. 15-33; pp. 80-82.

Deputy Commissioner and the 2nd Deputy Commissioner. In the Department of Health, the title (held by Palumbo) reports to the Deputy Commissioner for Administration and shares a line with the Assistant Commissioner, the Director of Fiscal Operations, and the Program Administrator for Payroll and Personnel. In the Department of Public Works, the title (held by Kopenhaver) reports to the Commissioner. In the IT Department, the title (held by Straface), reports to "Fiscal Administration," who in turn reports to the Chief Information Officer.⁴¹ In the Department of Correction, the title reports to the Associate Director of Division and shares a line with the Deputy Commissioner and the 2nd Deputy Commissioner. In the Department of Public Safety, the title reports to the Chief of Support Services, who in turn reports to the Commissioner.

Human Resources Specialist III, Diana Corwin, testified at the County's behest. Corwin plays a role in the creation of job titles and in 1996 conducted a study which resulted in the creation of the DAS-MO.⁴² Corwin testified that the job description includes duties such as preparation of the departmental budget, direction of personnel, overseeing contracts, handling labor issues with the union as they arise, and managing information systems, billing and accounts receivables. Corwin further testified that it would be appropriate for the DAS-MO to investigate disciplinary matters and report to a departmental commissioner or to adjudicate grievances at a low step in conjunction with the departmental commissioner.⁴³ Corwin also testified that a DAS-MO might determine eligibility for appointments on behalf of a commissioner or communicate with the law department on behalf of a commissioner regarding the interpretation of a collective

⁴¹ JX 1, at p. 20.

⁴² Tr, at pp. 130-131.

⁴³ Tr, at p. 135.

bargaining agreement (CBA).⁴⁴

Corwin does not have daily contact with any of the DAS-MOs. She testified that Koperhaver has called her “on occasion” regarding title classification issues.⁴⁵ Koperhaver reports to the Commissioner of Public Works and Transportation (CPWT). Corwin knew only that the CPWT directs the operations of his department, but lacked knowledge as to any specific duties that might classify him as managerial under the Act or classify his relationship with Koperhaver as confidential.⁴⁶

Assistant Chief Deputy County Attorney Carol Arcuri also testified for the County regarding the duties of DAS Poovapallil. Arcuri testified that she has communicated with Poovapallil on personnel issues and recalled two specific conversations on employee terminations that occurred several years ago.⁴⁷ Arcuri also testified that she handled a Fair Labor Standards Act (FLSA) issue with Straface.⁴⁸

DAS-MO Palumbo also testified. Palumbo has held the DAS-MO title within the County Health Department since 2002. She is supervised by the Assistant Commissioner of Health, Renee Recchia. Palumbo denied any involvement with setting policy, collective bargaining, personnel management or contract administration.⁴⁹ She said she does not talk to Recchia about negotiations and is not privy to the County’s strategies or proposals.⁵⁰ Palumbo also denied that she performs a number of duties outlined in her job description, such as resolution of labor conflicts, management of time and attendance, or

⁴⁴ *Id.*

⁴⁵ Tr, at pp. 137-138.

⁴⁶ Tr, at p. 138.

⁴⁷ Tr, at pp. 66-67.

⁴⁸ Tr, at p. 68.

⁴⁹ Tr, at p. 307.

⁵⁰ Tr, at pp. 307-308.

processing of payroll, among other tasks.⁵¹ Regarding creation of policies and/or procedures, Palumbo said she has been asked to draft those, but neither establishes their content nor implements them.⁵² In fact, she said that even Recchia does not have the authority to change or create any County policies or procedures without approval from the Commissioner. She also testified that she maintains time and leave records only for herself and would be involved in discipline only as a witness.

Assistant County Attorneys (ACAs)

ACAs have been part of the existing bargaining unit for several years and work in one of four Bureaus: Litigation, Appeals, Family Court, and Contracts and Real Estate.⁵³

Assistant Chief Deputy Carol Arcuri supervises the Law Department's Litigation Bureau and its associate county attorneys, senior assistant county attorneys and the ACAs. Arcuri worked as an ACA in the Litigation Bureau for two years between 1983 and 1987 and from 1997 until 2001, when she was promoted through the ranks and eventually to her current title in 2011. Arcuri testified that the titles still function in the same way and have not changed substantially since she held them.

Arcuri testified that when she was assigned to disciplinary matters as an ACA she would deal with a commissioner, department head or anyone else designated by them as a contact person. She would get her direction as to the penalty from the commissioner or his designee and she would be in an advisory role to the commissioner, the department head, or an executive director. All of the information discussed was considered by her to be confidential.

⁵¹ Tr, at pp. 309-310.

⁵² Tr, at p. 309.

⁵³ Tr, at pp. 18-19.

Testifying to cases involving human rights matters, Arcuri said that attorneys in the Litigation Bureau get direction from the appointing authority or his/her designee. Characterizing their discussions as confidential, Arcuri said that people are involved only on a “need to know” basis.⁵⁴ The same is true of cases that arise from Civil Service hiring lists. Arcuri added that discussions are held with the Commissioner of Human Resources or “whomever” he or she designates as the contact person, but did not identify the name or title of any such designee.

Arcuri described the supervisory structure of the Law Department as constituting, in descending order, the County Attorney, the Deputy County Attorney, the Assistant Chief Deputy County Attorney, associate county attorneys, senior assistant county attorneys, and the ACAs. She said, however, that the structure which exists on paper is actually not as rigid in practice. Generally, an ACA gets direction from a senior assistant county attorney, who gets direction from an associate and the associate from Arcuri. However, Arcuri could be directly supervising an ACA on a case, as could be a senior assistant county attorney or an associate. Arcuri also identified eight ACAs in the Litigation Bureau by name who have handled matters relating to personnel, discipline, employment issues, collective bargaining, and grievances. They are: Sara Beaty (discipline, discrimination, due process arbitrations, General Municipal Law (GML) § 207-c cases); George Burns (discipline, GML § 207-c, terminations, Civil Service Law §§ 73 and 75 cases, guardianship); Sean Carey (actions against the Commissioner of Human Resources, discipline, administrative proceedings); Nicholas Decicco (Civil Service list hiring, CSL § 75 hearings, GML § 207-c cases, discrimination, due process hearings); Katherine Hynes

⁵⁴ Tr, at p. 40.

(discipline under the CSL and CBA for corrections officers), Chris Inzero (CSL § 75 disciplines, CSL §§ 71 and 73 terminations, disciplinary procedures pursuant to the CBA for corrections officers, GML § 207-C hearings); David Polizzi (CSL §§ 71, 73 and 75 disciplines, GML § 207-C hearings, due process arbitrations, discrimination cases); and Melissa Jean-Rotini (CSL § 75, discrimination claims). The County entered into a stipulation that any ACAs not specifically mentioned by Arcuri during this testimony have not handled matters relating to personnel, discipline, employment issues, grievances and CBA administration.

Testimony was also given regarding two other ACAs, James Wenzel and Justin Adin, who are no longer in the ACA title. Wenzel, whom Arcuri said actually participated in negotiations and was a direct advisor to the commissioner regarding personnel issues such as release time, has left the County's employ. Adin, who also participated in negotiations, was promoted to the title of senior assistant county attorney by the time the hearing commenced and was called by the County as a witness. During his time as an ACA, Adin worked alongside the County's chief negotiator, Soule, and Berg in negotiations, along with Wenzel and some commissioners. He sat at the table and attended mediation sessions. He was privy to the County's strategy at the various stages of the process and worked closely with Grande in analyzing union demands. He also said that Grande was involved in discussions with the lead negotiator, Soule, and Berg as negotiations were on-going.

Through Arcuri the County also established that reassignment between bureaus within the Law Department is not uncommon.

DISCUSSION

Community of Interest

Under §§ 201.2 (b) and 201.5 of our Rules of Procedure (Rules), the filing of a unit placement petition commences a representation proceeding limited to determining whether an at-issue position should be accreted to a pre-existing unit. In determining a unit placement petition, we conduct a nonadversarial investigation and apply the statutory criteria set forth in § 207.1 of the Act.⁵⁵ Under § 207.1 of the Act, “[t]he existence of a “community of interest” [] is the *sine qua non* for placement in or creation of a unit.”⁵⁶ As we recently explained in *Cayuga Community College*:

Under this standard, the Board has consistently held that among the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, educational requirements, and an actual or potential conflict of interest between the members of the proposed unit.⁵⁷

We affirm the ALJ's finding that the petitioned-for titles at issue here share a sufficient community of interest with represented employees to be included in the same unit. As the ALJ found, petitioned-for employees share similar benefits with unrepresented employees. Indeed, the record indicates that the benefits available to bargaining-unit

⁵⁵ *County of Franklin*, 48 PERB ¶ 3025, 3096 (2015); *AFSCME, Local 264 (City of Buffalo)*, 46 PERB ¶ 3023, 3045 (2013); *General Brown Cent Sch Dist*, 28 PERB ¶ 3065, 3149 (1995).

⁵⁶ *Village of Scarsdale*, 49 PERB ¶ 3009, 3040 (2016); *AFSCME, Local 264 (City of Buffalo)*, 46 PERB ¶ 3023, at 3045; *Niagara Frontier Transportation Auth*, 45 PERB ¶ 3020, 3050 (2012).

⁵⁷ 49 PERB ¶ 3007, 3032 (2016), *citing County of Franklin*, 48 PERB ¶ 3025, at 3097 (quotation and editing marks omitted), *quoting Niagara Frontier Transportation Auth*, 45 PERB ¶ 3020, at 3050, *citing Sachem Cent Sch Dist*, 42 PERB ¶ 3030 (2009); *St. Paul Boulevard Professional Firefighters Assn*, 42 PERB ¶ 3009, 3028 (2009); *Monroe #1 BOCES*, 39 PERB ¶ 3024, 3077 (2006).

members and those available to unrepresented managers are “virtually identical,” with the chief distinction being the level of employee contributions required of employees.⁵⁸

Petitioned-for employees and represented employees also share similar salary structures, Civil Service classifications, minimum qualifications, work locations, and lines of supervision. Finally, as found by the ALJ, the petitioned-for titles are in many instances very similar to positions already in the unit, such as Director titles (including Director of Administrative Services titles),⁵⁹ Assistant Director titles, and Associate Budget Director titles.⁶⁰

The County’s argument that their job duties make certain employees ineligible for representation is addressed below in the discussion of whether employees should be excluded from the unit on the basis of their confidential employee status.

Confidential status: relevant legal standard

Section 201.7(a) of the Act defines a public employee as a “person holding a position by appointment or employment in the service of a public employer.” The statute exempts from this definition those individuals whom the Board may designate managerial or confidential. In order for a public employee to be designated either managerial or confidential, the criteria in § 201.7 (a) must be met. Section 207.7(a) states:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration, provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.

⁵⁸ JX 1, at p. 46.

⁵⁹ JX 1, at p. 46.

⁶⁰ 49 PERB ¶ 4003, at 4017-4018.

Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees concerning collective negotiations, contract administration or personnel administration.

The statutory criteria for such designations should be applied strictly, with all uncertainties resolved in favor of coverage under the Act.⁶¹

The Board has held that the Act establishes a two-pronged test for a confidential designation: the employee must both assist a managerial employee in his or her labor relations managerial functions and act in a confidential capacity to the managerial employee.⁶² The former prong reflects the confidential employee's duties, while the latter connotes a confidential employment relationship involving trust and confidence between the managerial employee and the confidential employee.⁶³ The two parts of the test are distinct, and satisfaction of one might not satisfy the other.⁶⁴

Director of Fiscal Operations

The ALJ found that Berg is a managerial employee for purposes of the confidential designation analysis, and there are no exceptions to this finding. The ALJ credited Berg's testimony that Arena and Jones have assisted Berg in negotiations with costing proposals and have access to the County's goals for collective bargaining and discredited the contrary testimony of Arena and Jones. As a result, the ALJ found that Arena and Jones

⁶¹ *Matter of Lippman v New York State Pub Empl Relations Bd*, 263 AD2d 891, 896, 32 PERB ¶ 7017 (3d Dept 1999), *confirming* 30 PERB ¶ 3067 (1997); *Town of Walworth*, 43 PERB ¶ 3013, 3052 (2010); *Fashion Institute of Technology*, 42 PERB ¶ 3018, 3061 (2009); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, 3014 (2000).

⁶² *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, 3033 (2013); *Town of Dewitt*, 32 PERB ¶ 3001, 3002 (1999).

⁶³ *Id.* See also *State of New York (Office of Parks, Recreation and Historic Preservation)*, 39 PERB ¶ 3007, 3030 (2006); *City of Rome*, 39 PERB ¶ 3009, 3037 (2006); *New York Power Authority*, 38 PERB ¶ 3003, 3008 (2005).

⁶⁴ *Town of Dewitt*, 32 PERB ¶ 3001, at 3002; *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3033; *North-Rose Wolcott Cent Sch Dist*, 33 PERB ¶ 3002, 3008 (2000).

are confidential employees. On exceptions, Local 456 argues that the ALJ wrongly discredited Arena and Jones. In addition, Local 456 argues that Berg's testimony is insufficient to support a confidential designation for Arena and Jones.

Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect. This is especially true where, as here, the credibility determination rests in part on the witness' demeanor."⁶⁵ Local 456 has not provided any objective evidence that establishes that the ALJ manifestly erred, and we see no reason to disturb the ALJ's credibility resolutions.

We also affirm the ALJ's finding that Arena and Jones should be excluded from the unit as confidential employees. As the ALJ found, Berg's testimony establishes that Arena and Jones frequently assist Berg during negotiations with costing analyses of potential County proposals and that both Arena and Jones have access to the County's goals and strategies for collective bargaining. Arena and Jones have a position of trust and confidence *vis-à-vis* Berg and act in a confidential capacity to him and additionally have access to information that has a direct relationship to and impact upon collective

⁶⁵ *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, 3077 (2015), *quoting UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); *see also Catskill Housing Auth*, 49 PERB ¶ 3025, 3081 (2016); *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019, *citing County of Tioga*, 44 PERB ¶ 3016, 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); *see also County of Ulster*, 39 PERB ¶ 3013, at 3045-3046, *citing Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974) (deference due credibility determinations based on observation of witness's demeanor).

negotiations and that presents a conflict of interest or “clash of loyalties.”⁶⁶ Together, these findings are sufficient to meet both prongs of the test for a confidential designation.

Senior Budget Analyst

The ALJ found that Soule is a managerial employee, and no exceptions were filed to this finding. The ALJ credited Soule’s testimony regarding the role that Grande and the other SBAs play in costing out proposals and discredited conflicting testimony from Maniscalco and Olli. The ALJ found that Grande is the “go to” person before and during negotiations⁶⁷ and found that the other SBAs are confidential because they work to assist Grande in doing final negotiations calculations prepared for Soule, the County negotiator, and/or the Deputy County Attorney. The ALJ found that the information to which SBAs have access, and the duties that SBAs perform, have a direct relationship to and impact upon collective negotiations and present actual or apparent conflicts of interest with their representation.

Local 456 excepts, arguing that SBAs are merely “resource persons” and have no knowledge of actual collective bargaining proposals.

We affirm the ALJ’s finding that Grande and the other SBAs should be excluded from the unit because both prongs of the test for confidential designation are met. The credited testimony⁶⁸ establishes that employees do more than perform ministerial, mathematical calculations. SBAs are privy to information about the county’s bargaining

⁶⁶ *Town of Dewitt*, 32 PERB ¶ 3001, at 3003. See also *Town of Ulster*, 36 PERB ¶ 3001, 3002 (2003) (finding exposure to negotiation proposal before they are exchanged sufficient to warrant a confidential designation).

⁶⁷ Tr, at p. 183.

⁶⁸ Local 456 also excepts to the ALJ’s credibility findings. However, because Local 456 has provided no objective evidence compelling a conclusion that the ALJ’s credibility resolutions are incorrect, we decline to disturb them. *Bellmore-Merrick Cent Sch. Dist.*, 48 PERB ¶ 3022, 3077.

position and proposals before the proposals are presented to the Union. The credited testimony also establishes that SBAs act in a confidential capacity to Soule, a managerial employee. Together, these findings are sufficient to warrant a confidential designation.⁶⁹

Associate Budget Director

The ALJ found that ABDs Medwid and Yazzetta should be excluded from the unit as confidential employees because they act in a confidential capacity to Soule and review costing of potential negotiations proposals and are privy to the assumptions that the County makes prior to negotiations. In this connection, the ALJ credited Soule's testimony and discredited the contrary testimony of Medwid and Yazzetta. Local 456 again argues that the ALJ's credibility resolutions are incorrect and that the evidence is insufficient to support a confidential designation.

We affirm the ALJ's finding. Local 456 has not provided any objective evidence demonstrating that the ALJ's credibility resolutions are manifestly incorrect. Based on the ALJ's crediting of the testimony that Medwid and Yazzetta both act in a confidential capacity to Soule and are privy to and review costing of potential proposals before they are presented to the union, we agree with the ALJ that the evidence is sufficient to warrant the exclusion of both ABDs as confidential employees.⁷⁰

Director of Administrative Services (Management Operations)

We affirm the ALJ's finding that the evidence is not sufficient to show that any of the DAS-MOs should be excluded from the unit as confidential employees. Like the ALJ, we reject the County's argument that the job description, particularly the provision stating that

⁶⁹ See *Town of Dewitt*, 32 PERB ¶ 3001, at 3003; *Town of Ulster*, 36 PERB ¶ 3001, at 3002.

⁷⁰ *Id.*

DAS-MOs “[d]irects the personnel function for the department,” “makes plain” that this title should be designated as confidential.⁷¹ Our designation of employees as confidential, like our examination of other unit placement issues, is based on the job duties actually performed, as shown on the record, and we will not deprive an employee of representation based on a job description alone.⁷²

There was no evidence presented to show that DAS-MOs actually perform the personnel functions described in the job description. In fact, the credited testimony of Palumbo, the only DAS-MO to testify, directly contradicts this assertion. Not only is there a lack of specific evidence demonstrating that DAS-MOs regularly perform confidential tasks or have regular access to personnel/labor relations information which “is not appropriate for the eyes and ears of rank and file personnel or their negotiating representative,”⁷³ there is also no evidence demonstrating that DAS-MOs act in a confidential capacity to a managerial employee. That is, the record is devoid of evidence showing that DAS-MOs are in a relationship of “trust and confidence” with any managerial employee.⁷⁴

In *Somers Central School District*,⁷⁵ the Board found that a confidential designation may be appropriate even if an employee has not yet performed confidential duties where the duties are contained in the employee’s job description but the opportunity to perform such confidential duties has not yet arisen. The County, citing *Somers*, argues that the job

⁷¹ County Br. in Support of Exc, at p. 8.

⁷² See *Village of Scarsdale*, 49 PERB ¶ 3009, at 3041; *County of Rockland*, 28 PERB ¶ 3063, 3145 (1995); *Town of East Fishkill*, 27 PERB ¶ 3073, 3166 (1994); *Adirondack Community College*, 20 PERB ¶ 3070, 3149-3150 (1987); *City of Binghamton*, 12 PERB ¶ 3099, 3186 (1979).

⁷³ *County of Otsego*, 34 PERB ¶ 3024, 3054 (2001); *North Rose-Wolcott Cent Sch Dist*, 33 PERB ¶ 3002, 3008 (2000).

⁷⁴ *Town of Dewitt*, 32 PERB ¶ 3001, at 3003. See also *City of Rome*, 39 PERB ¶ 3009, at 3037; *Village of Suffern*, 38 PERB ¶ 3016, 3057 (2005).

⁷⁵ 14 PERB ¶ 3058 (1981).

description, combined with Corwin's testimony, supports its argument that DAS-MOs should be excluded based on the possibility that employees will be asked to complete confidential duties in the future.

We agree with the ALJ that *Somers* is inapposite. There is no evidence that the reason employees have not performed confidential personnel duties is because the "opportunity" has not yet arisen. Indeed, Palumbo has held the title of DAS-MO since 2002. If confidential personnel duties were a part of her regular duties, one would expect that the opportunity to perform such duties would have arisen over a time period spanning more than a decade. While Corwin testified about functions that it would be "appropriate" for someone holding the DAS-MO title to perform,⁷⁶ we agree with the ALJ that this testimony was based solely on her interpretation of the job description. Corwin did not assert that employees actually perform these tasks, much less that the occasions in which those duties might arise have not yet presented themselves. The mere possibility that employees could be assigned confidential duties in the future is not sufficient to warrant their designation as confidential employees.⁷⁷

Assistant County Attorneys

After hearing testimony from the County's witnesses in support of its petition to have ACAs declared confidential employees, the ALJ found that additional testimony from ACAs that Local 456 intended to call was unnecessary, and the ALJ closed the hearing. In her decision, the ALJ found that ACAs are not confidential employees.

The County excepts to the ALJ's decision not to hear testimony from any

⁷⁶ See Tr, at pp. 135-136.

⁷⁷ *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, at 3016 n. 16; *City of Newburgh*, 16 PERB ¶ 3053, 3082 (1983); *City of Binghamton*, 12 PERB ¶ 3099, at 3186. See also *Village of Scarsdale*, 49 PERB ¶ 3009, at 3040-3041.

employees serving as ACAs and argues that, should the Board conclude that the record lacks sufficient evidence to designate ACAs as confidential employees, the Board should remand this matter to the ALJ and order that the testimony of ACAs be taken and a decision reissued.

Initially, we agree with the ALJ that there is no basis to exclude ACAs in the Appeals, Contracts and Real Estate, and Family Court Bureaus. The County stipulated that these employees have not handled any disciplinary or other personnel matters. Thus, there is simply no basis to find that these ACAs perform confidential job duties. The mere possibility that these employees may be reassigned to the Litigation Bureau in the future is too remote and speculative to warrant a designation as confidential employees.⁷⁸

The County offered evidence that two former ACAs, Adin and Wenzel, were involved in collective bargaining. Because Adin and Wenzel are no longer employed as ACAs, the ALJ properly found that they are no longer the subject of the petition. We reject the County's suggestion that all ACAs should be designated as confidential employees because "there is no reason to believe that other ACAs will not perform tasks performed by Adin and Wenzel."⁷⁹ As discussed above, a confidential designation requires a showing that confidential job duties are actually performed.⁸⁰ Again, the mere speculative possibility that employees may perform confidential job duties at some point in the future is insufficient to justify excluding such employees from representation.

⁷⁸ *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3033; *New York Power Authority*, 38 PERB ¶ 3003, 3008 (2005); *Adirondack Community College*, 20 PERB ¶ 3070, at 3149; *City of Binghamton*, 12 PERB ¶ 3099, at 3186.

⁷⁹ County Br. in Support of Exc, at p. 11.

⁸⁰ *Village of Scarsdale*, 49 PERB ¶ 3009, 3041, citing *City of NY v Bd of Certification of the City of NY*, 2011 WL 5240150 (Sup Ct NY Co 2011); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, at 3016 n. 16; *City of Newburgh*, 16 PERB ¶ 3053, at 3082; *City of Binghamton*, 12 PERB ¶ 3099, at 3186.

Finally, we address the eight ACAs in the Litigation Bureau. The County, relying on Assistant Chief Deputy Carol Arcuri's testimony, asserts that these ACAs engage in confidential communications with commissioners on personnel issues such as grievances and employee disciplinary matters.⁸¹

Because ACAs in the Litigation Bureau did not testify, the record contains few details about their job duties, supervisory structure, or their involvement in grievances and other employee disciplinary matters. As a result, we are unable to determine whether ACAs in the Litigation Bureau actually perform confidential duties. Nor is the record sufficiently clear for us to determine whether ACAs in the Litigation Bureau are in a confidential employment relationship involving trust and confidence between the ACAs and a managerial employee. Local 456 was prepared to offer the testimony of ACAs in the Litigation Bureau, and this testimony could illuminate these gaps in the record. Further, we are mindful that determining unit placement is in the nature of a "mini-representation proceeding," calling only for a non-adversarial investigation.⁸² Accordingly, we remand this matter to the ALJ for further proceedings to develop the record as to the job duties that ACAs in the Litigation Bureau actually perform and their employment relationship with asserted managerial employees.


IT IS, THEREFORE, ORDERED that Local 456's unit placement petitions are granted to the extent of placing the Director of Operations (Senior Programs and Services), Director of Administrative Services (Management Operations), Director of Program Development II (Capital Projects), Director of Temporary Assistance, Director of

⁸² *County of Franklin and Franklin County Sheriff*, 48 PERB ¶ 3025, 3096 (2015); *State of New York*, 36 PERB ¶ 3007, 3020-3021 (2003); *General Brown Cent Sch Dist*, 28 PERB ¶ 3065, 3149 (1995).

Child Welfare, and Director of Program Development I (Capital Asset Management) into the negotiating unit represented by Local 456. We also affirm the ALJ's findings that the following titles should be excluded from the unit as confidential employees: Director of Fiscal Operations, Associate Budget Director, Senior Budget Analyst, and Assistant Director of Division (PRC).

IT IS FURTHER ORDERED that the Assistant County Attorney title is remanded to the ALJ for further processing consistent with this decision.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000 AFSCME, AFL-CIO,**

Charging Party,

CASE NO. U-32951

- and -

BUFFALO SEWER AUTHORITY,

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSELS
(JENNIFER ZEGARELLI of counsel), for Charging Party**

**HISCOCK & BARCLAY LLP (ROBERT P. HEARY of counsel)
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buffalo Sewer Authority (Authority) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO (CSEA).¹ In her decision, the ALJ held that the Authority violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when the Authority failed to provide information in response to a demand from CSEA.²

¹ 49 PERB ¶ 4539 (2016).

² The ALJ also deferred the allegation in the charge that the Authority violated § 209-a.1 (d) when it provided a newly appointed employee with sick leave, personal leave, and vacation benefits in excess of those provided for under the CBA to the parties' contractual grievance procedures and conditionally dismissed that portion of the charge. As no party has excepted to this holding, any such exceptions have been waived and are not properly before us. Rules of Procedure § 213.2 (b) (4), *see, eg, NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

EXCEPTIONS

In its exceptions, the Authority argues it provided the information requested by CSEA. Further, the Authority argues that, even assuming it violated the Act, a notice-posting remedy is not warranted.

CSEA supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. CSEA is the bargaining representative for a unit of white collar Authority employees which includes the position of principal clerk. At the time of the dispute at issue, the parties were subject to the terms of a collective-bargaining agreement (CBA), effective July 1, 2012 to June 30, 2014.

Paulette Lee was appointed to a vacant principal clerk position with the Authority on April 22, 2013, from a City of Buffalo civil service preferred eligible list. Lee had been on the preferred list as a result of her layoff from that title by the Buffalo Board of Education. Her seniority date according to civil service records is January 8, 2001.

In May 2013, after Lee had begun work at the Authority, Thomas Cicatello, a former Authority employee and CSEA local unit president from 2002 until his retirement in 2014, received inquiries from unit employees regarding the fact that Lee was taking time off, raising a concern as to whether she had been credited with accrued leave time earned at the Board of Education. The CBA provides that persons employed by the Authority on or before June 1, 1983, who had previous service with the City of Buffalo, Board of Education and/or Buffalo Municipal Housing Authority, are entitled to vacation accruals inclusive of that prior service; however, vacation accruals are credited only

from the date of hire with the Authority for employees hired after June 1, 1983.³ As defined in Article II, Section 12, “an individual’s ‘date of hire’ is the date he or she first became an employee of the [Authority].”⁴

After Cicatello unsuccessfully attempted to discuss the issue of Lee’s accruals with David Comerford, the Authority’s general manager, and Karen Bonvissuto, a senior administrative assistant handling personnel matters, Cicatello raised the matter with CSEA labor relations specialist Richard Toth. Cicatello and Toth discussed the need to obtain information regarding what benefits Lee was in fact receiving, and whether those benefits were warranted due to her preferred list status or whether a grievance should be filed.

On July 9, 2013, Toth sent a letter to Comerford requesting the following information:

1. Copies of all documents and other tangible evidence that the Authority may rely upon to determine what benefits [Lee] is entitled to.
2. Copies of all documents and other tangible evidence of what benefits [Lee] is currently receiving under the collective bargaining agreement.
3. What is [Lee’s] seniority date with the Sewer Authority?⁵

Toth requested that the above information be submitted by July 25, 2013.

On July 25, 2013, Comerford responded to Toth, stating that CSEA’s July 9, 2013 request was under review with the Authority’s counsel and a reply would be issued promptly upon receipt of counsel’s response.⁶ Toth issued a second letter to Comerford on July 29, 2013, requesting an answer to the information request within ten days.

³ Joint Ex 1, at pp. 39 and 4.

⁴ Joint Ex 1, at p. 4.

⁵ Joint Ex 2.

⁶ Joint Ex 3.

A response was sent from Charles Martorana, an attorney with Hiscock & Barclay LLP, dated August 6, 2013, advising that his office served as special counsel for the Authority and was currently working with the Authority to respond to Toth's inquiry.⁷

On August 8, 2013, Martorana issued a letter to Toth in response to the information request, as follows:

In response to your letters dated July 9, 2013 and July 29, 2013 to the [Authority], enclosed are the following documents that the Authority has relied upon with respect to the appointment of [Lee] to the position of principal clerk:

1. Agreement by and between the [Authority] and [CSEA] for July 1, 2012 – June 30, 2014.
2. Buffalo Sewer Authority Employee Handbook dated May 2012.
3. New York [State] Civil Service Laws §§ 80-81, inclusive.
4. Buffalo Sewer Authority Certificate of Appointment of [Lee], together with letter by Patricia P. Folts, Commissioner of Human Resources dated March 27, 2013.
5. Preferred List adopted July 1, 2012.
6. Human Resources/Civil Service Roster Card for [Lee] (redacted to delete social security number).⁸

Please contact me if [you] have any additional questions or need more information.

Toth testified that he received only attachments (1), (3) and (6) with Martorana's letter. Toth did not follow up with Martorana regarding the missing information or make any further information requests because he "thought it would be a waste of time."⁹

The document listed in Martorana's letter at (4), the Authority Certificate of Appointment of Lee (submitted with a letter by Patricia P. Folts, Commissioner of Human Resources, dated March 27, 2013), lists Lee's effective appointment date with

⁷ Joint Ex 5.

⁸ Joint Ex 6.

⁹ Tr, at pp. 38-39.

the Authority as April 22, 2013, and her salary at the fifth step of the pay scale, with the notation: "Certified from Preferred List – Original Date of Hire: 01/08/2001."¹⁰

Lee's civil service roster card, enclosure (6), shows that she was reinstated to the position of principal clerk on April 22, 2013, with her appointment to the Authority from the preferred eligible list adopted July 1, 2012, at a pay rate of \$54,744. It further provides the history of her employment, and the fact that Lee was laid off from her permanent principal clerk position with the Board of Education at a pay rate of \$39,379 when the position was abolished on June 29, 2012.¹¹

DISCUSSION

It is well-settled under the Act that an employee organization has a general right to receive documents and information, requested from an employer, for use by the employee organization in collective negotiations, the resolution of negotiation impasses and in the administration of agreements including, but not limited to, the investigation of a potential grievance, the processing of a grievance and in the preparation for a grievance hearing and/or arbitration.¹² The right to receive requested documents and information is limited by the necessity and relevancy of the information sought, the

¹⁰ Respondent Ex 4.

¹¹ Respondent Ex 6. Under the terms of the parties' agreement, the starting salary for the principal clerk position at the Authority at step one is \$45,655, and progresses through the fifth step to \$54,744. Joint Ex 1, at pp. 7 and 10.

¹² *City of Buffalo*, 50 PERB ¶ 3012 (2017); *Board of Ed City Sch Dist of the City of Albany*, 6 PERB ¶ 3012, 3030 (1973) (*City of Albany*); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032, 3061 (1976); *City of Rochester*, 29 PERB ¶ 3070, 3164-3165 (1996); *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶ 3019, 3042-3043 (2001); *County of Erie and Erie County Sheriff*, 36 PERB ¶ 3021, 3064 (2003), *confirmed sub nom. County of Erie and Erie County Sheriff v State of New York*, 14 AD3d 14, 37 PERB ¶ 7008 (3d Dept 2004); *Town of Evans*, 37 PERB ¶ 3016, 3049 (2004); *State of New York (OMRDD)*, 38 PERB ¶ 3036, 3125 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Relations Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007).

reasonableness of the request, considering the burden on the employer, and the availability of the information elsewhere.¹³

The Authority does not dispute that the information requested by CSEA was necessary, relevant, and reasonable. The Authority argues only that it provided information fully responsive to CSEA's request. We reject this argument.

First, Toth testified that he received only items (1) (the parties' CBA), (3) (New York State Civil Service Laws §§ 80-81), and (6) (Lee's Civil Service roster card) listed in Martona's letter. The ALJ credited this testimony, and the Authority has provided no objective evidence that warrants our disturbing the ALJ's credibility determination.¹⁴ Thus, to the extent the Authority argues that Lee's Certificate of Appointment¹⁵ provides the requested information, that document was not provided to CSEA prior to the hearing.

In any event, we agree with the ALJ that the Authority has not provided all of the information requested by CSEA, even assuming that the Authority sent all six of the documents listed in Martona's cover letter. First, the Authority has not provided any documents showing Lee's accruals or other benefits, information requested in item #2 of Toth's request. While the Authority has provided documents that show the date of Lee's appointment to the Authority and her original date of hire, we agree with the ALJ that the unexplained citations to these two different dates leaves CSEA's question about Lee's seniority date with the Authority unanswered. Thus, the Authority has failed to provide information responsive to item #3 of Toth's request.

We note that Toth never contacted Martona to inform him either that Toth had not

¹³ *Id.*; see also *Utica City Sch Dist*, 48 PERB ¶ 3008, 3026 (2015).

¹⁴ *County of Greene and Sheriff of Greene County*, 44 PERB ¶ 3042 (2011); *County of Tioga*, 44 PERB ¶ 3016 (2011).

¹⁵ Respondent Ex 4.

received all of the documents cited in Martona's cover letter or that CSEA considered the Authority's document production to be insufficient. In situations where an employer attempts, in good faith, to respond to an information request, it may be a better practice for the employee organization to attempt to resolve any perceived deficiencies directly with the employer.¹⁶ The statutory obligation, however, is for the employer to provide requested documents and information that are necessary for, among other purposes, investigating and processing a grievance. The Authority here has failed in that obligation.


IT IS, THEREFORE, ORDERED that the Authority shall:

1. Forthwith provide CSEA the following information:
 - a. Copies of all documents and other tangible evidence identifying the benefits received by unit employee Paulette Lee, including her benefit accruals; and
 - b. Lee's seniority date with the Sewer Authority for purposes of her receipt of benefits under the parties' collective bargaining agreement; and

¹⁶ Compare *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, 3052 (2008) ("it is a better practice, but not a statutory obligation under the Act, for a responding party, when it doubts the relevance and necessity of the request, to seek greater specificity, and not to simply ignore or refuse the request"), *confirmed sub nom. Hampton Bays Union Free Sch Dist v New York State Pub Empl Relations Bd*, 62 AD3d 1066, 42 PERB ¶ 7005 (3d Dept 2009).

2. Sign and post the attached notice at all physical and electronic locations normally used to communicate with CSEA unit employees.¹⁷

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

¹⁷ The purpose of the notice posting requirement is to help ensure that all unit employees have knowledge of their rights and others' obligations, and it is our policy to order a posting of notice in all cases in which a violation of the Act has been found unless there is contrary good cause shown. *City Sch Dist of the City of Port Jervis*, 24 PERB ¶ 3031, 3061 (1991). The Authority has not provided good cause for us to deviate from our policy here.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Buffalo Sewer Authority represented by the Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO (CSEA) that the Buffalo Sewer Authority will:

Forthwith provide CSEA the following information:

1. Copies of all documents and other tangible evidence identifying the benefits received by unit employee Paulette Lee, including her benefit accruals; and
2. Lee's seniority date with the Sewer Authority for purposes of her receipt of benefits under the parties' collective bargaining agreement.

Dated

By
on behalf of the **BUFFALO SEWER AUTHORITY**

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

THOMAS HALL,

Charging Party,

CASE NO. U-34494

- and -

MOUNT PLEASANT CENTRAL SCHOOL DISTRICT,

Respondent.

**HAROLD, SALANT, STRASSFIELD & SPIELBERG (CHRISTOPHER HAROLD
& ELIZABETH G. HAROLD of counsel), for Charging Party**

INGERMAN SMITH LLP (GUS MOUNTANOS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Thomas Hall to a decision and order of an Administrative Law Judge (ALJ) dismissing his improper practice charge, in which he alleged that the Mount Pleasant Central School District (District) retaliated against him in violation of §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by issuing him a counseling letter.¹ The ALJ found that, even assuming that Hall had established a *prima facie* case of retaliatory motive, the evidence in the record as a whole demonstrated that the District acted for legitimate business reasons and was not motivated by anti-union animus.

EXCEPTIONS

Hall filed four exceptions to the ALJ's decision, in which he argues that the ALJ should have found: (1) a broader range of his conduct to be protected activity; (2) that

¹ 49 PERB ¶ 4554 (2016).

Superintendent Susan Guiney had knowledge of Hall's protected conduct; and (3) that District Director of Facilities Edward Kear was motivated by anti-union animus in reporting Hall's conduct to Guiney. Hall also argues that the ALJ should not have credited Guiney's testimony but instead should have found that Guiney's decision to issue the counseling letter to Hall exhibited anti-union animus. The District supports the decision of the ALJ and contends that no basis has been demonstrated for reversal.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

FACTS

The facts are fully set forth in the ALJ's decision, and are discussed here only as far as is necessary to address the exceptions. Hall has been employed by the District since 1999, and he is tenured in the areas of biology and general science. On January 9, 2001, Hall was elected as the union's health and safety representative to act as a liaison between the administration, the teachers, and the union on health and safety issues.² He has served in that role to the present. He attended at least one health and safety conference paid for by the union and sponsored by the union affiliate, the New York State United Teachers (NYSUT). Union president Ellen Igo described Hall as the "go to person" for the union with respect to health and safety issues. She testified that she believed she told Guiney in passing that Hall was attending the 2015 NYSUT conference on the union's behalf.

Hall also serves with other staff members by appointment of the board of

² Charging Party's Ex 8 (1).

education to the District's Safety Committee. The District solicits volunteers for this committee and the union has no involvement in the selection process. Hall advocated for the District to have two separate committees: A Safety Committee and a Health and Safety Committee. He had on a number of occasions suggested this to the District Director of Facilities, Edward Kear, who believed that those two committees were one and the same, which conclusion Hall challenged.³

Kear has held his position since October 2013 and, in that capacity, regularly interacts with Hall and other members of the District Safety Committee.

On April 8, 2015, as Hall and Kear were walking to a District Safety Committee meeting, Hall informed Kear that prior to Kear joining the District, Hall was able to resolve matters with Kear's predecessor on a one-to-one basis. Kear testified that he was annoyed with the discussion and lost his temper with Hall because that is not how he conducts business. Kear said that the Safety Committee he oversees is a "committee" and he solves issues by way of committee, "not just two folks behind closed doors taking care of issues."⁴ Kear said that Hall "continued to badger me" and persisted in telling Kear how he should manage issues.⁵ Kear said he responded that he would not do as Hall suggested and specifically added, "You don't get it. You're ticking me off."⁶

Almost six months prior to the exchange, Hall proposed a class project that came

³ There was also evidence that Hall spoke to union president Ellen Igo about this and that Igo also communicated with the Superintendent about creating a second committee. Hall was copied on an e-mail regarding this. Charging Party's Ex 9.

⁴ Tr, at p. 243.

⁵ *Id.*

⁶ Tr, at pp. 277-279.

to involve Kear and other District administrators. By e-mail dated November 7, 2014, Hall informed Guiney of his interest in conducting a demonstration involving tapping the sugar maples in the woodlot behind the middle school.⁷ Although this was to include boiling the sap into maple syrup using a propane cooker in an area outside of the school building on school premises, the e-mail did not indicate those details, nor were they shared verbally with Guiney.⁸ Guiney told Hall to speak with Kear and the middle school principal, Robert Hendrickson, to see if the project would be feasible, but Hall testified that he spoke only with the latter.⁹

Hall enlisted the assistance of interim teacher Cynthia LePere, and they spoke with Hendrickson sometime between the fall of 2014 and spring of 2015. Hall testified that he described to the principal the particulars of the project, including the boiling process, the use of a propane cooker, and the specific location. Hall said Hendrickson was supportive, but advised that a fire extinguisher must be kept handy during the demonstration.

On the date of the project, March 27, 2015, a custodian, Chris Carpenter, advised Kear that the activity was taking place close to a gas line which entered the school. After Carpenter's visit, Kear reported the situation to Guiney. He testified that he did not observe the project himself since it was not under his supervision. Guiney met with Hendrickson, who claimed he did not authorize the use of an open flame or realize the proximity of the gas line to the propane cooker. That notwithstanding, she

⁷ Respondent's Ex 4.

⁸ Tr, at pp. 153-155.

⁹ Tr, at p. 153.

told him he should not have allowed the project to take place in that location and using an open flame and called it “totally inappropriate.”¹⁰

After the project was completed, Hall went to Hendrickson’s office to report that he was done. Hendrickson told Hall to see the superintendent and apologize for how the demonstration was conducted. Before Hall went to the superintendent’s office, he stopped to see Kear, who said he believed the project posed a safety hazard. Hall disagreed and said he would address the issue with Guiney. On his way to Guiney’s office, he saw her in the hall and apologized, possibly twice. He testified that he did so, despite his belief that he had done nothing wrong, because he did not want her to be upset with him. Guiney testified that she did not take his apology as an admission of guilt and that it did not influence how she handled the matter. Instead, she said that she had concluded before meeting Hall that he had created an unacceptable safety hazard for the school. She said she was influenced by the fact that just the day before there was a newspaper story about a gas line explosion in New York City.

On April 2, 2015, Guiney drafted a letter to Hall admonishing him for the manner in which the project was conducted.¹¹ Hall received the letter on April 16, 2015. Guiney’s letter directed Hall to, in the future, “speak directly to the principal and/or the Director of Buildings and Grounds” when a question of safety arises and to obtain prior authorization when planning to engage in a potentially unsafe activity. In a response from Hall dated April 22, 2015, and received by the superintendent on May 8, 2015, he

¹⁰ Tr, at p. 292.

¹¹ Joint Ex 1. Neither LePere nor Hendrickson received a letter since, according to Guiney, their positions with the District were ending in June.

stated that he did notify the principal in advance of the project.¹² On June 25, 2015, Hall and Guiney met to discuss the exchange of letters. Hall wanted the letter from Guiney removed from his file. She said she only would consider modifying it to reflect Henrickson's awareness of the project and its location. The original letter, however, was not altered.

Guiney testified that she has known Hall since her arrival at the District in 2008 and has a cordial professional relationship with him. She testified that he is an honest person and a terrific teacher who has integrity. She testified that she, alone, made the decision to write the counseling memorandum.

DISCUSSION

When an improper practice charge alleges unlawfully motivated retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.¹³ As we have often reaffirmed, "[t]he ultimate burden of proof always remains with the charging party."¹⁴

¹² Joint Ex 2.

¹³ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally, *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), confirmed sub nom. *Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

¹⁴ See *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015), see also *Catskill Housing Auth*, 49 PERB ¶ 3025, 3080 (2016); *Village of Endicott*, 47 PERB ¶ 3017, at 3050.

The initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low.¹⁵ The “ALJ is required to accept the charging party’s evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence.”¹⁶

Only “if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated.”¹⁷ The employer can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or through the presentation of “evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.”¹⁸ If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual.¹⁹ When a charging party fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed.²⁰

Here, the ALJ found that, even assuming that Hall had established a *prima facie*

¹⁵ *Id.* (citing, *inter alia*, *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043; *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Town of Tuscarora*, 45 PERB ¶ 3044 (2012); *Board of Educ of the City Sch Dist of the City of New York (Guttman)*, 46 PERB ¶ 3008 (2013).

¹⁶ *Id.*, quoting *Town of Tuscarora*, 45 PERB ¶ 3044, at 3112, citing *Bd of Ed of the City Sch Dist of the City of New York (Baez)*, 35 PERB ¶ 3044 (2002) and *Bd of Ed of the City Sch Dist of the City of New York (Freedman)*, 34 PERB ¶ 3036 (2001).

¹⁷ *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; see generally, *Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir. 2015).

¹⁸ *Catskill Housing Auth*, 49 PERB ¶ 3025, at 3080-3081; *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), citing *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

¹⁹ *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076.

²⁰ *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037, citing *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013); *County of Tioga*, 44 PERB ¶ 3016 (2011).

case of retaliatory motive, the evidence in the record as a whole demonstrated that the District acted for legitimate business reasons and was not motivated anti-union animus. The ALJ credited Guiney's testimony that she alone made the decision to issue a counseling letter to Hall. The ALJ also credited Guiney's explanation that the only reason she decided to issue the letter was because she was concerned for the safety of the school premises and wanted to protect the District from experiencing a similar situation in the future. On this basis, the ALJ found that the District had met its burden of showing that its conduct in issuing a counseling letter to Hall was not improperly motivated.

Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect. This is especially true where, as here, the credibility determination rests in part on the witness' demeanor."²¹ Hall has not provided any such objective evidence that establishes that the ALJ manifestly erred.

In his exceptions, Hall argues, among other things, that the District could have taken different action, that it could have also issued counseling letters to other

²¹ *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077, quoting *UFT (Cruz)*; 48 PERB ¶ 3004 (2015), see also *Mount Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Catskill Housing Auth*, 49 PERB ¶ 3025, at 3081; *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008), citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); see also *County of Ulster*, 39 PERB ¶ 3013, at 3045-3046, citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974) (deference due credibility determinations based on observation of witness's demeanor).


employees involved in the maple syrup project, and that the counseling letter contains alleged inaccuracies. None of these assertions, however, provides objective evidence that Guiney was untruthful or that the ALJ's credibility finding is manifestly incorrect. As the ALJ stated, "[e]ven if I disagree with Guiney's judgment, she expressed it credibly."²² In sum, on the record before us, we find that the ALJ's credibility-based determination that the District was not motivated by anti-union animus was not manifestly incorrect.

We find it unnecessary to address the remainder of Hall's exceptions. Even if we were to agree with Hall in all respects, our findings would not provide a basis on which to reverse the ALJ's credibility-based finding that Guiney issued the counseling letter for legitimate business reasons.

Accordingly, we affirm the ALJ's decision to dismiss Hall's charge alleging that the District violated §§ 209-a.1 (a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

²² 49 PERB ¶ 4554, at 4661.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

HARVEY BRODY,

Charging Party,

CASE NO. U-33738

- and -

**STATE OF NEW YORK (OFFICE OF MEDICAID
INSPECTOR GENERAL),**

Respondent.

USHER Z. PILLER, for Charging Party

**MICHAEL N. VOLFORTE, GENERAL COUNSEL (LYNN HOMES LYON
of counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Harvey Brody to a decision and order of an Administrative Law Judge (ALJ) dismissing his improper practice charge, in which he alleged that the State of New York (Office of Medicaid Inspector General) (OMIG) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it refused to lift its prohibition on Brody's contact with any OMIG employee during the period of his disciplinary suspension.¹ The ALJ found that Brody failed to establish a *prima facie* case of retaliatory motive.

EXCEPTIONS

Brody filed three exceptions to the ALJ's decision. First, he excepts to the

¹ 49 PERB ¶ 4564 (2016).

ALJ's finding certain asserted facts to be irrelevant. Second, he argues that the ALJ erred in finding that Brody's initial suspension, including OMIG's prohibiting him from contacting OMIG employees during the suspension, was not at issue. Third, he argues that the ALJ erred in not concluding that OMIG's actions violated §§ 209-a.1 (a) and (c) of the Act, without a showing of improper motivation. OMIG supports the decision of the ALJ and contends that no basis has been demonstrated for reversal.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

FACTS

Brody is employed by OMIG in the title Medicaid Investigator 1, and is a member of the professional, scientific and technical (PS&T) bargaining unit of state employees represented by the Public Employees Federation (PEF).

On October 19, 2012, Matthew R. Chiesa, the Director of Employee Relations for OMIG, served a letter upon Brody informing him that he was being suspended with pay immediately and that he was not permitted to "have contact with anyone associated with [OMIG]."

On May 20, 2014, Brody was named by the PEF Division 191 stewards' council as its Director of Research.

On August 12, 2014, Usher Pillar, Council Leader of PEF Division 191, sent an email to Chiesa requesting that OMIG lift its prohibition on Brody contacting anyone associated with OMIG, so that Brody could "contact certain Management and PS&T personnel that are currently employed at OMIG" because PEF Division

191 “is interested in pursuing possible grievances, PERB actions and other litigation.”²

On August 13, 2014, Chiesa responded to Piller, stating that the prohibition remains in place.³

Piller responded to Chiesa the same day, asserting that the prohibition on Brody was an improper restraint on Brody's ability to participate in legitimate union activities.⁴ Chiesa responded, shortly thereafter, by reiterating that Brody was “currently suspended, and as such, is prohibited from contacting anyone associated with OMIG. That prohibition will remain in place for the entirety of his suspension.”⁵

Brody requested a hearing in this proceeding, in order to testify that: he has been a PEF steward in good standing since September 19, 2012; his duties as Director of Research encompass generally the same duties required of a union steward; he has suffered mental stress and anguish as a result of OMIG denying his request for access to its employees; and, since October 19, 2012, he has been on “continuous full work status.”⁶ Additionally, Brody sought to offer the testimony of a PEF official to establish that he is entitled under PEF rules to function as Director of Research for PEF Division 191. The ALJ denied Brody's request for a hearing, finding that such facts, even if proved, are neither necessary, nor relevant, to a determination in this matter.

² ALJ Exs. 1, 5.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Although Brody disputes that he was truly suspended, he does not dispute that he was given a letter from Chiesa stating that he was “suspended with pay.” Moreover, Brody admits that, since October 19, 2012, he “wasn’t given any work assignment other than to remain at home.”

DISCUSSION

Initially, we agree with the ALJ that the action alleged to be unlawful is OMIG's refusal to lift the restriction on Brody's contact with other OMIG employees in August of 2014. OMIG's initial restriction on Brody's contact with other OMIG employees occurred in October of 2012, well outside the four-month limitations period set forth in § 204.1 (a) of our Rules of Procedure. Although Brody argues that the charge alleges an "ongoing violation of the Act", the Board has consistently declined to apply a "continuing violation" theory in the context of an improper practice proceeding such as this.⁷

When an improper practice charge alleges unlawfully motivated interference, retaliation, or discrimination in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.⁸ These elements establish a *prima facie* case and give rise to an inference of improper motivation.⁹ Only "if

⁷ *City University of New York*, 40 PERB ¶ 3004, 3013 (2007); *New York City Transit Auth.*, 26 PERB ¶ 3081, 3157 (1993); *City of Yonkers*, 7 PERB ¶ 3007, 3011 (1974).

⁸ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally, *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), confirmed sub nom. *Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

⁹ See *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.

the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated.”¹⁰

We agree with the ALJ that Brody failed to establish a *prima facie* case here. As a threshold matter, Brody does not allege that his initial suspension was motivated by any protected activity on his part, or by anti-union animus. Nor does he allege any protected activity undertaken by him during the period of his suspension, let alone that such protected activity was known to OMIG.¹¹

Neither is there any evidence tending to support that OMIG would have lifted the prohibition on Brody contacting OMIG employees during Brody’s suspension but for Brody’s engagement in PEF activities or that OMIG’s refusal to lift the restriction is related in any manner to Brody’s current involvement with PEF activity. After imposing the restriction in 2012, OMIG simply refused to change its position when requested, and there is no basis to conclude that unlawfully motivated retaliation or discrimination was a factor in OMIG’s decision.

The outcome remains the same even accepting as true Brody’s assertion that, if a hearing had been held, he would have presented testimony establishing that: he has been a PEF steward in good standing since September 19, 2012; his duties as Director of Research encompass generally the same duties required of a union steward and that he is entitled under PEF rules to function as Director of

¹⁰ *Id.*; *Mt. Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *see generally, Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir. 2015).

¹¹ While such allegations would themselves be time-barred, they would be admissible as evidence of motive. *See, eg, District Council 37 (Gonzales)*, 28 PERB ¶ 3062 (1995).

Research for PEF Division 191; he has suffered mental stress and anguish as a result of OMIG denying his request for access to its employees; and, since October 19, 2012, he has been on “continuous full work status”. Treating all of these assertions as true, we affirm the ALJ’s finding that Brody failed to establish a *prima facie* case. None of Brody’s proffered evidence supports an inference that OMIG would have lifted the prohibition on Brody contacting OMIG employees but for his protected activity.

Finally, certain of Brody’s exceptions suggest that a prohibition on contacting fellow employees of the same agency is “inherently destructive” of employees’ Section 202 rights and can be found unlawful without a showing of improper motivation.¹² We reject this argument as untimely under the circumstances at issue here.

According to Brody, his duties as Director of Research are generally the same duties required of a union steward. Brody further alleges that he was a PEF steward in October 2012 when OMIG initially prohibited him from having any contact with OMIG employees. By Brody’s own allegations, to the extent the prohibition affects Brody’s Section 202 rights, the prohibition had the same effect and impact in 2012, when it was initially imposed, as in 2014, when OMIG refused to lift the prohibition. Thus, Brody’s appointment to a position with the Union is not a supervening event that is sufficient to make OMIG’s refusal to lift the prohibition in 2014 a new action that can be challenged through the filing of

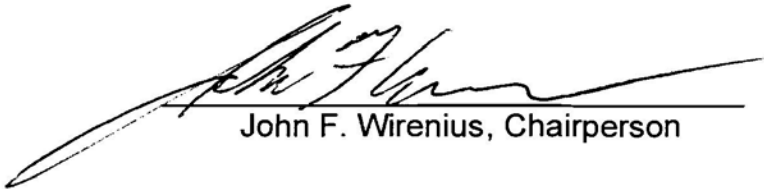
¹² See *County of Monroe*, 43 PERB ¶ 3025, 3097 (2010); *Greenburgh #11 Union Free Sch Dist*, 33 PERB ¶ 3018, 3049 (2000); *State of New York*, 10 PERB ¶ 3108, 3190 (1977).

an improper practice charge. In short, having failed to challenge the terms of his suspension in 2012, including the prohibition on contacting other OMIG employees, Brody cannot now be heard to argue that the suspension is inherently destructive of his Taylor Law rights.

Accordingly, we affirm the ALJ's decision to dismiss Brody's charge alleging that the District violated § 209-a.1 (a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CHARLES AYALA,

Charging Party,

CASE NO. U-35386

- and -

**NEW YORK CITY TRANSIT AUTHORITY and
TRANSPORT WORKERS UNION, LOCAL 100,**

Respondents.

CHARLES AYALA, *pro se*

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Charles Ayala to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge.¹ Ayala alleged in his charge that the New York City Transit Authority (NYCTA) violated §§ 209-a.2 (a), (b) and (c) of the Public Employees' Fair Employment Act (Act) and that the Transport Workers Union, Local 100 (TWU) violated §§ 209-a.2 (a) and (c) of the Act when the Collective Bargaining Agreement's (CBA) procedure was not followed during the processing of three of his grievances. More specifically, Ayala alleged that the basis of the charge as against both Respondents was their "failing to follow the Contract in effect failing [sic] to represent me...and my rights negotiated in the CBA." Ayala also alleges that, pursuant to the CBA, his grievances should have received a "Step 2 hearing" rather than a "Step 1 hearing."

¹ 50 PERB ¶ 4513 (2017).

Ayala was advised that his charge was deficient because, *inter alia*, there were no facts alleged to arguably establish a violation of §§ 209-a.1 (a), (b) and (c), or §§ 209-a.2 (a) and (c) of the Act. Ayala was also advised in the deficiency notice that employer actions unrelated to the Act's protections of a public employee's right to form, join and participate in an employee organization, or to refrain from doing so, are not within PERB's jurisdiction. Finally, Ayala was advised that a bargaining agent violates its duty of fair representation under the Act only if its actions are arbitrary, discriminatory or in bad faith; that he should clearly and concisely summarize his complaints; and that providing attachments does not suffice.

In response, Ayala filed an amendment on December 8, 2016, wherein he reiterated the same facts provided in the original charge, with the same set of attachments. Ayala also stated in his amendment that NYCTA and TWU "violated contract section 1.6 B-1."

The Director found that Ayala's amended charge failed to correct the deficiencies in the original charge, and she dismissed his charge in full.

EXCEPTIONS

Ayala excepts to the ALJ's decision by a letter. In his letter, Ayala asserts that NYCTA has failed to process his grievances according to the terms of the CBA "to interfere with, restrain and coerce [me] in the exercise of my rights to participate in the grievance process negotiated by TWU 100." Ayala also asserts that TWU "is deliberately restraining my exercise of the rights granted in section two hundred two by refusing to secure that [NYCTA] abide by [the CBA]." Ayala attached to his exceptions some of the same attachments that he submitted with his charge and amended charge.

DISCUSSION

Ayala's letter exceptions are undated, but were postmarked March 17, 2017, and thus were timely filed. However, no proof of service upon the other parties was provided. A letter was sent to Ayala on March 22, 2017, pointing out this omission and giving Ayala an opportunity to provide the requisite proof of service.² Ayala failed to respond in any manner. Pursuant to § 213.2 (a) of our Rules of Procedure (Rules), "[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied."³ Thus, on the record before us, Ayala's exceptions were not timely served and, therefore, must be denied.⁴

We also note that Ayala's exceptions are deficient because they fail to comply with the requirements of § 213.2 (b) of our Rules. The exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," or "state the grounds for exceptions." In view of Ayala's *pro se* status, however, we have examined the exceptions and the charge and amended charge submitted to the Director.

Even if the exceptions had been timely served and filed, we would affirm the

² Both NYCTA and TWU were sent copies of our letter to Ayala. Neither filed any papers in response.

³ *Transport Workers Union of Greater New York, Local 100, AFL-CIO (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *United Federation of Teachers (Hunt)*, 48 PERB ¶ 3005, 3012 (2015); *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, at 3058. (citing *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042 (2011); *UFT (Elgalad)*, 43 PERB ¶ 3028 (2010); see generally *Honeoye Falls-Lima Cent Sch Dist (Malcolm)*, 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002); *Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

⁴ *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012; *UFT (Pinkard)*, 44 PERB ¶ 3011, at 3042.

Director's decision. First, to the extent that Ayala asserts additional facts in his exceptions that might arguably establish a violation of §§ 209-a.1 (a), (b) and (c), or §§ 209-a.2 (a) and (c) of the Act, we do not consider them. These facts were not presented to the Director and are not part of the record in this proceeding. Because these facts were not a part of the record considered by the Director, they cannot be considered by us in reviewing the correctness of her decision.⁵

The sole factual contention before the Director was that NYCTA and the TWU did not properly apply the parties' collective bargaining agreement in processing his grievance. As stated in § 205.5 (d) of the Act, "the [B]oard shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."⁶ We are therefore constrained to dismiss the charge as against NYCTA, as the charge does not allege any facts arguably establishing that NYCTA interfered with any rights protected by § 202 of the Act, that NYCTA dominated or interfered with the formation or administration of his union, or that NYCTA retaliated or discriminated against him for engaging in union activity.⁷

Likewise, neither the charge nor the amended charge alleges any facts

⁵ CSEA (*Josey*), 49 PERB ¶ 3022, 3072 (2016) (quoting *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995)); *United Federation of Teachers, Local 2*, 48 PERB ¶ 3015, 3054 (2015); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992); *Board of Cooperative Educational Services of Sullivan County*, 14 PERB ¶ 3101, 3170-3171 (1981).

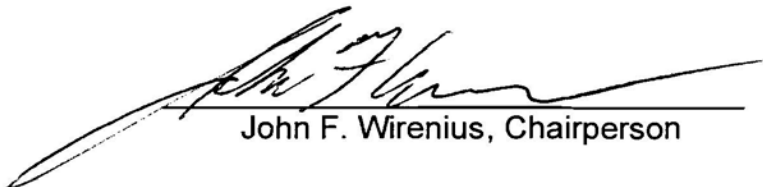
⁶ Act, § 205.5 (d).

⁷ *City of Canandaigua*, 44 PERB ¶ 3047, 3140 (2011); *City of Glens Falls*, 25 PERB ¶ 3011, 3030 (1992), confirmed, 195 AD2d 933, 26 PERB ¶ 7009 (3d Dept 1993); *North Babylon Union Free Sch Dist*, 11 PERB ¶ 3024, 3043 (1978).

establishing that TWU interfered with any rights protected by § 202 of the Act, or that TWU breached its duty of fair representation by acting toward him arbitrarily, discriminatorily, or in bad faith. Therefore, the charge fails to state a claim as against TWU as well as NYCTA.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CHEMUNG COUNTY DEPUTY
SHERIFF'S ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-34545

- and -

**COUNTY OF CHEMUNG and
CHEMUNG COUNTY SHERIFF,**

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

**COUGHLIN & GERHART, LLP (PAUL J. SWEENEY of counsel), for
Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Chemung and the Chemung County Sheriff (together, County) to a decision and order of an Administrative Law Judge (ALJ) finding that the County violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred work exclusively performed by members of the Chemung County Deputy Sheriff's Association (Association) to non-unit members.¹ More specifically, the ALJ found that the County transferred security duties at the department of social services (DSS) building and the Elmira Corning Regional Airport that had been exclusively performed by deputy sheriffs employed by the County and represented by the Association to non-unit security deputies.

EXCEPTIONS

The County filed three exceptions to the ALJ's decision, arguing: (1) security

¹ 49 PERB ¶ 4532 (2016).

deputies are members of the same unit as deputy sheriffs, and so there has been no actual transfer of unit work; (2) the disputed security work was never exclusively performed by deputy sheriffs; and (3) even if the Board finds that the County violated the Act, it should not order a make-whole remedy.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

Prior to 2013, the Association's bargaining unit consisted of both civilian and police officer titles, whose terms and conditions of employment were governed by a collective bargaining agreement (CBA) spanning the period of 2003 to 2008.² Upon the expiration of that agreement, the parties began negotiations on a successor agreement. After negotiations on the successor agreement failed, the Association filed for impasse on behalf of its police officer titles and proceeded to interest arbitration.³ The Association continued to negotiate with the County on behalf of the civilian portion of the unit and subsequently executed a memorandum of agreement (MOA) spanning the period of 2009 to 2012.⁴ The MOA specifically covered employees in title grades 1, 3, and 3a.⁵

Sometime in 2012, prior to the execution of the 2009-2012 MOA, Anthony Solfaro, the President of the New York State Union of Police Associations, Inc. (NYSUPA), the Association's affiliate organization, began discussions with the County

² Tr, Volume I, at pp. 19-21.

³ Tr, Volume I, at pp. 20-21. The arbitrator's award covered the deputy sheriffs until December of 2010. Joint Ex. 4.

⁴ Tr, Volume I, at pp. 18-19. Joint Ex. 2.

⁵ Tr, Volume I, at p. 18. Joint Ex. 2.

about splitting the bargaining unit into two units: civilians and non-civilians.⁶ The purpose of the split was to keep one unit of employees eligible for interest arbitration under the Act on one track of negotiations and create a separate unit for those ineligible for interest arbitration.⁷ Sheriff Christopher Moss testified that the split was essentially conforming the new units to the two negotiating paths that had already been created:

Well, what you have to remember is because of the interest arbitration, the bargaining separated, because the deputies knew they were going to interest arbitration. They got a two-year award and added two years to it. The non-police personnel negotiated a different deal. I think that's where the idea came to separate the two units.⁸

On or around April 11, 2013, the Association's president, Michael Ruocco, had a discussion with the Deputy County Executive, Michael Krusen, during which Krusen indicated that he "wanted to remove all the non-law enforcement personnel and place them into a separate bargaining unit."⁹ After that discussion, Ruocco contacted NYSUPA's attorney, Marilyn Berson.¹⁰ Berson was aware of the discussions on splitting the unit and had reached out to both Krusen and Moss to discuss the issue on at least three prior occasions.¹¹ On June 10, 2013, approximately one month after her last letter requesting the County's positions on the new units' compositions, Berson

⁶ Tr, Volume I, at pp. 20, 23.

⁷ Tr, Volume I, at p. 153.

⁸ Tr, Volume I, at pp. 156-157.

⁹ Tr, Volume II, at pp. 26-27.

¹⁰ Tr, Volume II, at p. 27.

¹¹ Charging Party's Exs. 2, 3 and 4. Charging Party Ex. 3 is a letter from Berson to Krusen and Moss dated May 9, 2013, stating that the Association had voted to request that the County and the Sheriff voluntarily agree to recognize two separate bargaining units. One unit would be comprised of "Special Deputies/DSS, Deputy Sheriff, Sergeant[,] Lieutenant, Captain, excluding all others." The second unit would contain "Stenographer, Clerk, Account Clerk, Records Clerk employed in the Office of the Sheriff and Communications Operators and Senior Communications Operators employed in the Office of Fire and Emergency Management, excluding all others."

received an e-mail from Moss reading, “I will concur with the decision made by the Chemung County Deputy Executive Michael Krusen pertaining to any future composition of the Deputy Sheriff Bargaining Unit.”¹² Berson replied indicating that she would confirm the units’ compositions in writing.¹³

Based on the information Berson received from Ruocco indicating that Krusen wanted separate law-enforcement and non-law enforcement units,¹⁴ she drafted the following June 11, 2013 letter memorializing the split:

Dear Mr. Krusen and Sheriff Moss:

I am writing to confirm that the County and Sheriff have agreed to recognize two separate bargaining units, with separate collective bargaining agreements, as follows:

1. Special Deputies/DSS [security deputies],¹⁵ Deputy Sheriff, Sergeant[,], Lieutenant, Captain, excluding all others.
2. Stenographer, Clerk, Account Clerk, Records Clerk employed in the Office of the Sheriff and Communications Operators and Senior Communications Operators employed in the Office of Fire and Emergency Management, excluding all others.

The Association will continue to act as the exclusive bargaining agent for each to negotiate their terms and conditions of employment and for all other purposes pursuant to New York’s Taylor Law.¹⁶

Notably, it is undisputed that security deputies are “peace officers” who are not eligible for interest arbitration under the Act.¹⁷ This letter was sent electronically and via

¹² Charging Party’s Ex. 5.

¹³ *Id.*

¹⁴ Tr, Volume II, at p. 17.

¹⁵ In 1996, the County’s Civil Service Commission changed the special deputies/DSS title to security deputies. Tr, Volume I, at pp. 88, 116, 121. The job duties and qualifications remained the same after the name change and the parties stipulated at the hearing that the proper name for the at-issue title is security deputy. Tr, Volume I, at pp. 9, 88, 91.

¹⁶ Respondent’s Ex. 1 (emphasis added).

¹⁷ Tr, Volume I, at pp. 121, 157.

regular mail to Krusen and Moss and copied via electronic mail to Solfaro and Ruocco.¹⁸ In September of 2013, the Association filed an improper practice charge in Case No. U-33004 that contained a description of the deputy sheriffs unit exactly as it appeared in Berson's June 11, 2013 letter, including the security deputies title.¹⁹ Berson testified that she drafted the charge, which was signed by Solfaro, and that she used the June 11, 2013 letter to draft the charge.²⁰

In December of 2013, the parties executed a MOA covering "Deputy Sheriff[s], Sergeants, Lieutenants and Captains" for the period January 1, 2011 through December 31, 2012.²¹

At some point in early 2015, Berson received a telephone call from Solfaro asking about the presence of the security deputies' title in her June 11, 2013 letter as being included in the deputy sheriffs' unit.²² During that call, Solfaro informed Berson that the security deputies were not deputy sheriffs, but peace officers.²³

According to Berson's testimony, she knew that deputy sheriffs provided security at the DSS building and mistakenly believed that "Special Deputies/DSS" were also deputy sheriffs.²⁴ Indeed, since 2008 until the transfer at issue here in 2015, there had not been any security deputies assigned to the DSS building.²⁵ During that seven-year period, deputy sheriffs were the only officers performing security work at that building.²⁶

In January of 2015, the parties executed a MOA covering the newly created

¹⁸ Respondent's Ex. 1. See *also* Tr, Volume I, at pp. 12, 21.

¹⁹ Respondent's Exs. 1, 2.

²⁰ Tr, Volume I, at p. 74.

²¹ Joint Ex. 4.

²² Tr, Volume II, at p. 21.

²³ *Id.*

²⁴ Tr, Volume I, at p. 73.

²⁵ Tr, Volume 1, at p. 41.

²⁶ *Id.*

civilian unit spanning the period of 2013 to 2018 and specifically covering titles in grades 1, 3, and 3a.²⁷ Security deputy is a grade 1 title, and the benefits for those in that title are currently determined by the civilian unit's 2013-2018 MOA.²⁸

In August 2015, the County hired several part-time security deputies and assigned them to perform security work at the DSS building and the airport.²⁹ From approximately 2001 to 2015, the deputy sheriffs performed all security work at the airport.³⁰

According to Ruocco, the displacement of the deputy sheriffs at the DSS building and airport limits the unit members' ability to move shifts and bid for days off.³¹ It also eliminates overtime that was available at those locations.³² Ruocco further testified that the DSS building and airport security assignments were considered more desirable than road patrol, especially for officers close to retirement.³³ In sum, those assignments allowed for more flexibility and variety in the deputy sheriffs' schedules and, when available, permitted officers to work overtime at those locations.³⁴

The County presented no evidence as to what benefits were gained and what interests it had in transferring the work of deputy sheriffs at these locations to non-police titles.

²⁷ Tr, Volume I, at pp. 18, 23. Joint Ex. 3. Moss testified that he was told by Krusen to sign the MOA and they would work out the placement of the security deputies later. Tr, Volume I, at p. 105. Moss further testified that he believed that when the red-lined version of the civilian unit's collective bargaining agreement was completed, the "security deputies would come out and into the law enforcement side." Tr, Volume I, at p. 141.

²⁸ Tr, Volume I, at pp. 19, 114.

²⁹ Tr, Volume I, at pp. 46-49.

³⁰ Tr, Volume I, at pp. 107-108.

³¹ Tr, Volume I, at pp. 49-50.

³² Tr, Volume I, at pp. 50, 52.

³³ Tr, Volume I, at pp. 49-52.

³⁴ *Id.*

DISCUSSION

We first address the County's exception to the ALJ's finding that the parties intended to place security deputies into the "civilian" unit, among the other titles that are not eligible for interest arbitration under the Act, and not into the "police" unit, which included deputy sheriffs.

To support its argument that security deputies should be included in the "police" unit with deputy sheriffs, the County relies on the Association's "repeated admissions that the Security Deputies and Sheriff Deputies were to be part of the same bargaining unit"³⁵ in Berson's May and June 2013 letters and the improper practice charge filed in September 2013, which describe one unit as containing "Special Deputies/DSS, Deputy Sheriff, Sergeant[,] Lieutenant, Captain, excluding all others."³⁶ The County also cites Sheriff Moss's testimony that he never agreed to the placement of security deputies in either unit.³⁷

On the record before us, the most authoritative evidence of the parties' agreement on unit composition is the 2003-2008 CBA and the three subsequent MOAs. These instruments are the result of bilateral negotiations and were signed by or on behalf of all of the parties here, including the Sheriff. An examination of these documents support the finding that the parties agreed to place security deputies into the civilian unit.

The MOA covering deputy sheriffs for the time period of January 1, 2011 through December 31, 2012 was signed on December 3, 2013, after the parties had discussed

³⁵ Br in Support of Exc, at p. 5.

³⁶ The Association asserts that the inclusion of security deputies in the same unit description as deputy sheriffs in these instances was a good-faith error.

³⁷ Br in Support of Exc, at p. 7.

splitting the unit into two.³⁸ This MOA covers “Deputy Sheriff[’]s, Sergeants, Lieutenants and Captains,” all police officer titles, but makes no mention of security deputies, a civilian “peace officer” title that is not eligible for interest arbitration. This MOA thus recognizes a “police” unit of titles eligible for interest arbitration. On the other hand, the most recent civilian MOA, signed on January 2, 2015 and covering the years 2013 through 2018, includes security deputies, as a grade 1 title. Moreover, it is undisputed that security deputies have been treated as members of the civilian bargaining unit, receiving the pay and benefits outlined in the civilian MOA. Thus, not only does the MOA place security deputies in the civilian unit, but the County’s treatment of security deputies has been consistent with an agreement to include them in the civilian unit. This evidence is also consistent with the uncontradicted testimony supporting the ALJ’s finding that the parties intended to create one unit of interest arbitration-eligible employees and one unit of employees who did not qualify for interest arbitration.

Berson’s May and June 2013 letters and the improper practice charge filed in September 2013, which characterize security deputies as members of the “police” unit, do not undermine our conclusion. First, Berson’s characterization of the deputies as members of the “police” unit is an acknowledged error made by one party, while the MOA expressly including the deputies in the civilian unit represents a mutual agreement by the joint employers and the Association. Similarly, the police unit’s MOA does not include security deputies, consistent with their relegation to the civilian unit, and, indeed, with the County’s treatment of them throughout the relevant period. That is, the Association’s mistaken representations that security deputies were members of the

³⁸ Joint Ex. 4

“police” unit are not persuasive evidence of the parties’ agreement, especially when compared to the MOAs and the County’s practice. Moreover, Berson’s letters were sent and the improper practice charge filed before the parties agreed to the MOAs which, as explained above, place security deputies into the “civilian” unit. Thus, assuming that the Association’s representations that security deputies were members of the “police” unit had any legal effect at all, such effect was superseded by the parties’ subsequent agreement to place security deputies into the “civilian” unit, separate from deputy sheriffs, and by the County’s undisputed practice of treating security deputies as members of the civilian unit.

In sum, we find that the evidence supports the ALJ’s finding that the parties intended to place security deputies into the “civilian” unit, separate from deputy sheriffs.

Moving to the merits of the allegation that the County unlawfully transferred unit work, we find that the elements of the charge have been established, although this case’s centering on the separation of a larger unit into two distinct groups, one civilian and one police, and subsequent confusion regarding unit composition distinguish it from more typical instances. It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1 (d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to have become a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.³⁹ If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications. When

³⁹ *Cayuga Community College*, 50 PERB ¶ 3003, 3012-3013 (2017); *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083, 3182 (1985).

there has been a significant change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.⁴⁰

Here, the ALJ found that deputy sheriffs had exclusively provided security at the airport since 2001 and the DSS building from 2008 until the County transferred this work to non-unit security deputies in 2015. The County does not dispute these factual findings, but argues that the work was not exclusive to deputy sheriffs because: (1) the job description for security deputies says that security deputies are responsible for performing security work in County-owned buildings; (2) security deputies were assigned to the DSS building between 1992 and 2007; and (3) a security deputy position remained filled from 2008-2015 with a security deputy who worked in the Civil Division and who was, according to the County, “capable of performing the security work at the DSS Building”⁴¹

We reject the County’s arguments. First, “it is the duties actually performed, not the duties which might have been or could have been performed, which are material in a transfer of unit work case.”⁴² That other employees might have been “capable” of performing the work is immaterial. Second, in determining the issue of exclusivity, we apply the following past practice test: the “practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would

⁴⁰ *Cayuga Community College*, 50 PERB ¶ 3003, 3012-3013, *quoting State of NY (Div State Police)*, 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012), *citing Town of Riverhead*, 42 PERB ¶ 3032 (2009).

⁴¹ Br in Support of Exc, at p. 8.

⁴² *County of Erie*, 30 PERB ¶ 3017, 3036 (1997).

continue.”⁴³ Prior to 2013, security deputies and deputy sheriffs were members of the same bargaining unit, and the County could have assigned security tasks at the DSS building and the airport to either title without the assignment raising concerns of an unlawful transfer of unit work. Nevertheless, the County chose to assign this work to deputy sheriffs since 2008 at the DSS building and since at least 2001 at the airport. More directly to the point, the County’s practice of assigning these security tasks to deputy sheriffs continued uninterrupted after the unit split into police and non-police units for approximately two years, until the transfer at issue in August 2015. Under the circumstances present here, we find this latter period of time to be sufficient to establish exclusivity in these circumstances to become a binding practice.⁴⁴

The ALJ found that the security tasks being performed by the security deputies at the DSS building and the airport are identical to those previously assigned to and performed by the deputy sheriffs’ unit members. The County did not except to this

⁴³ *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3024 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009); *see also Cayuga Community College*, 50 PERB ¶ 3003, 3013; *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, at 3046-3047 (2007), *quoting County of Nassau*, 24 PERB ¶ 3029 (1991) (subsequent history omitted).

⁴⁴ *See, eg, Buffalo City School District*, 45 PERB ¶ 3002, 3003 (2012) (finding nine months sufficient to establish exclusivity); *City of New Rochelle*, 44 PERB ¶ 3002, 3028 (2011) (finding one-year period of exclusivity sufficient to establish enforceable past practice); *City of Rochester*, 21 PERB ¶ 3046, 3090 (1988), *confd* 155 AD2d 1003, 22 PERB ¶ 7035 (4th Dept 1989) (finding 13 months sufficient in the circumstances to establish exclusivity); *see also County of Columbia*, 45 PERB ¶ 3025, 3058 (2012) (finding two-and-a-half year time period sufficient to establish exclusivity).

We further note that the parties, through the “police” MOA and the “civilian” MOA, effectively drew a hard line between the two units, and, to the extent that they could, made that line retroactive—the “police” MOA, although signed in December 2013, was deemed by them to be effective as of January 1, 2011. The record establishes that from that effective date to the transfer at issue here, the work was exclusively performed by employees whose relationship with the employer was governed by the “police” MOA. In view of the nearly two years between the parties’ agreement to formally split the unit and the County’s transfer of the security work, which we deem to be sufficient to establish exclusivity, we need not address whether the parties’ effort to retroactively effect the splitting of the unit bears on exclusivity.

finding.

The inquiry does not end there, however, since the at-issue work, which formerly had been exclusively performed by police officers, is now being performed by non-police officers. As we explained in *State of New York (Division of State Police)*, “[t]he substitution of civilians for police officers or fire fighters to deliver services previously performed by those uniformed personnel necessarily reflects an *employer’s determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks.*”⁴⁵ Here, the change in qualifications took place in August 2015, based on the status quo established by the 2013 division of the larger unit into separate police and civilian units, with the work at issue remaining with the police unit.⁴⁶ Such a change in qualifications occasioned by the substitution of a civilian for a uniformed officer has long been deemed sufficient to trigger the balancing of employer and employee interests under *Niagara Frontier* and its progeny.⁴⁷

The Association offered evidence that, as a result of the transfer, unit employees lost flexibility and variety in their schedules as well as overtime opportunities. The County offered no evidence or argument to the ALJ indicating what interest, if any, it had in transferring the work of deputy sheriffs to non-police security deputies. In these circumstances, the ALJ found that the interests weigh in favor of the Association. The County has not excepted to this finding or presented any argument to us concerning

⁴⁵ 48 PERB ¶ 3012, 3042 (2015) (emphasis in original), *quoting Fairview Fire District*, 29 PERB ¶ 3042, 3099 (1996).

⁴⁶ Although not strictly relevant, due to both titles having been in the same unit prior to 2013, the work at issue had been assigned to police employees at the DSS building since 2008 and at the airport since at least 2001.

⁴⁷ *Id.* at 3042-3043; *Town of Stony Point*, 45 PERB ¶ 3045, at 3115; *Fairview Fire District*, 29 PERB ¶ 3042, 3099 (1996).

what interest, if any, it had in transferring the work. As a result, any exceptions to the ALJ's finding have been waived.⁴⁸

In sum, we affirm the ALJ's finding that the County violated § 209-a.1 (d) when it unilaterally transferred exclusive bargaining-unit work at the DSS building and the airport to non-unit employees.

With respect to the remedy, we find that the ALJ's recommended "make whole" order is appropriate. Such a remedy is consistent with our practice in cases where an employer unlawfully transfers unit work.⁴⁹ While the situation here was caused by the unusual circumstance of an informal unit clarification, and further confused by the Association's 2013 assertions about the composition of the unit, the County knew or should have known in 2015 that it was in transferring the work of one unit to another. Make whole relief is not intended to be punitive, but rather to "effectuate the policies of the Act by restoring, as nearly as possible, the *status quo ante*."⁵⁰

Accordingly, the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the County forthwith:

1. Cease and desist from unilaterally transferring to nonunit employees the work at the DSS building and the airport exclusively performed by the deputy sheriffs within

⁴⁸ Rules of Procedure § 213.2 (b) (4); *see, eg, Village of Endicott*, 47 PERB ¶¶3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶¶ 3021, 3072, n. 4 (2016) (citing cases).

⁴⁹ *See, eg, Seaford Administrators Assn*, 47 PERB ¶¶ 3034, 3106-3107 (2014); *County of Seneca and Seneca County Sheriff*, 47 PERB ¶¶ 3005, 3016 (2014); *City of New Rochelle*, 44 PERB ¶¶ 3002, at 3028; *County of Onondaga*, 24 PERB ¶¶ 3014, 3026 (1991), *confd* 187 AD2d 1014, 25 PERB ¶¶ 7015 (4th Dept 1992), *motion for leave to appeal denied* 26 PERB ¶¶ 7003 (1993).

⁵⁰ *County of Westchester*, 49 PERB ¶¶ 3031, 3103 (2016); *see, eg, Town of Wallkill*, 42 PERB ¶¶ 3017, 3057 (2009); *City of Troy*, 28 PERB ¶¶ 3027, 3065 (1995); *Verona Sherrill Teachers Assn (Burton)*, 29 PERB ¶¶ 3074, 3178, at n. 4 (1996); *see also Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶¶ 3022, 3079 (further facts required prior to applying "our well established preference for make whole relief, which we reaffirm herein"); Act, § 205.5 (d).

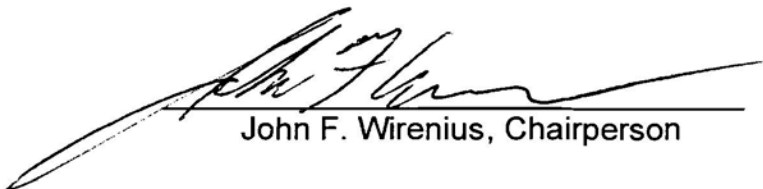
the bargaining unit represented by the Association;

2. Make the affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of said work, with interest at the maximum legal rate;

3. Restore to the bargaining unit said work at the DSS building and the airport;
and

4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: June 14, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE**

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

**NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify all employees of the County of Chemung and Chemung County Sheriff (County) in the unit represented by the Chemung County Deputy Sheriff's Association, Inc. that the County will forthwith:

1. Not unilaterally transfer to nonunit employees the work at the DSS building and the airport exclusively performed by the deputy sheriffs within the bargaining unit represented by the Association;
2. Make the affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of said work, with interest at the maximum legal rate; and
3. Restore to the bargaining unit said work at the DSS building and the airport.

Dated

By
on behalf of the County of Chemung and
Chemung County Sheriff

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.